

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:) CASE NO: 05-39857-H1-7
)
) Houston, Texas
CYRUS II PARTNERSHIP,)
) Tuesday, May 26, 2009
)
Debtor.) (11:12 a.m. to 12:15 p.m.)
) (1:33 p.m. to 3:58 p.m.)

#930 - APPLICATION FOR COMPENSATION;
#931 - APPLICATION FOR COMPENSATION;
#942 - APPLICATION FOR COMPENSATION

BEFORE THE HONORABLE MARVIN ISGUR,
UNITED STATES BANKRUPTCY JUDGE

Appearances: See next page

Case Manager: Anita Dolozel

Court Recorder: Paula Crawford

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Also present: RODNEY TOW, ESQ.
Chapter 7 Trustee

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1 Houston, Texas; Tuesday, May 26, 2009; 11:12 a.m.

2 | (Call to Order)

5 **MR. LEE:** Good morning, your Honor; Kyung Lee and
6 Jason Rudd on behalf of Diamond McCarthy, special counsel for
7 the Chapter 7 trustee.

8 **MR. RIOS:** Good morning, your Honor; Randy Rios, Lynn
9 Kramer and Nan Eitel on behalf of ORIX Capital Markets, LLC.

10 **MR. HILL:** Your Honor, Joe Hill, general counsel for
11 Rodney Tow.

12 **MR. PHILLIPS:** Your Honor, Louis M. Phillips on
13 behalf of Gordon Arata McCollam Duplantis and Eagan, applicant.

14 | **MR. TOW:** Your Honor, Rodney Tow, trustee.

15 **THE COURT:** All right. Mr. Lee was here early and I
16 asked him how much time you-all were going to need, if he
17 thought we were going to need more than between now and lunch.
18 The afternoon's a zoo. I've got time on June 1 for things we
19 don't finish today, but I'd just suggest let's get as much done
20 as we can between now and noon, recognizing that that may not
21 be everything and I don't want to rush you.

22 So tell me what everybody's calendars look like for
23 continuing this on June 1 if we need to. That's Monday.

24 MR. RIOS: Your Honor, just a couple of things.

25 THE COURT: Okay.

1 **MR. RIOS:** Mr. Lee and I had agreed that in light of
2 the fact that Mr. Phillips and Ms. Eitel are from out of town
3 and they traveled in today that we would take those
4 applications up first to the extent that we can get those
5 finished; that's the goal.

6 **THE COURT:** Ms. Eitel's application?

7 **MR. RIOS:** Excuse me.

8 **MS. EITEL:** The Gordon Arata application.

9 **MR. RIOS:** The Gordon Arata application.

10 **THE COURT:** Okay.

11 **MR. RIOS:** I apologize, your Honor.

12 **THE COURT:** And then is Ms. Eitel going to testify?

13 **MR. RIOS:** She is, your Honor.

14 **THE COURT:** And will that apply to both Mr. Phillips
15 and to Mr. Lee's applications?

16 **MR. RIOS:** She will not be testifying as to Mr. Lee's
17 application.

18 **THE COURT:** Okay. And you have no problem with that
19 I guess?

20 **MR. LEE:** No, your Honor. And in fact, the only
21 point I do need to make is I'm going to be putting on
22 Mr. Phillips on his application to assist him.

23 **THE COURT:** Okay. And -- go ahead.

24 **MR. RIOS:** June 1st, your Honor --

25 **THE COURT:** June 1st, which is next Monday, this

1 Monday.

2 **MR. RIOS:** -- we anticipate calling Mr. Greg May with
3 ORIX. He's available on June 4th of next week. He's not
4 available on June 1st. I apologize to the Court.

5 **THE COURT:** I can do it at 3:30 on the 4th if that's
6 going to get us finished, or else we can start on the 1st and
7 then pick it up again with Mr. May on the 4th.

8 You two are just from across the street basically,
9 right?

10 **MR. RIOS:** Correct, your Honor.

11 **THE COURT:** Well, you're not quite across the street,
12 but close enough.

13 So I'll leave it up to you-all, and when we get to
14 the end of the hearing, we can either come back on Monday and
15 on Thursday or just on Thursday, depending on whether you think
16 an hour and a half is going to be enough to get it done.

17 **MR. RIOS:** Very well, your Honor.

18 **THE COURT:** Okay. And maybe we'll pick up some of
19 that today.

20 Mr. Hill?

21 **MR. HILL:** Your Honor, just one other preliminary
22 thing. There was sort of a non-objection in a way to, or a
23 limited objection I guess, to Mr. Tow's fee application, but
24 what I anticipate from the witness list is he's going to be
25 cross examining in connection -- or examine in connection with

1 the two special counsel applications. I'd like permission of
2 the Court to carry that evidence forward to the extent that it
3 impacts on Mr. Tow's application.

4 **THE COURT:** Any objection by anyone?

5 **(No audible response)**

6 **THE COURT:** That's fine; we'll do that.

7 What is the deal on Mr. Tow's application? I
8 remember there was an amendment to the law on Chapter 7 trustee
9 fees. Do I have to review that at all, his commission fee, or
10 is his commission fee etched in stone?

11 **MR. HILL:** Well, when they admitted it, they didn't
12 make it quite as strong as the trustee wanted it, so I think
13 the Court still has latitude on that --

14 **THE COURT:** Okay.

15 **MR. HILL:** -- to review it. And it is still the
16 maximum. I think there is language in there that makes it more
17 akin to a commission than taking a Load Star-type approach with
18 it.

19 **THE COURT:** Because I tried to look back at the
20 language to see what kind of discretion I had and couldn't find
21 that language that I thought had been added that eliminated the
22 discretion. So, it's still discretion. I don't mean totally
23 discretionary but the --

24 **MR. HILL:** With some emphasis on the fact that it's a
25 commission, yes, sir; that's my understanding. Now, as I

1 understand there are courts all over the country that are going
2 different directions on that a little bit, and it's still a
3 point of contention, but that's my understanding.

4 **THE COURT:** So you do the calculation on the
5 commission and the Court could change it if it needed to.

6 **MR. HILL:** Yes, sir, that's my understanding.

7 **MR. RIOS:** It's consistent with our understanding as
8 well, your Honor.

9 **THE COURT:** Okay. All right, let's begin with
10 whoever's going to prosecute the Gordon Arata -- Who's your
11 first witness?

12 **MR. LEE:** For the record, your Honor; Kyung Lee here
13 on behalf of Gordon Arata. Lewis Phillips will be my first
14 witness.

15 **THE COURT:** All right. Mr. Phillips?

16 **MR. LEE:** May I approach, your Honor?

17 **THE COURT:** Yes, sir.

18 **MR. LEE:** We have some exhibits which are not in CD
19 format.

20 Over the weekend, your Honor, for the record,
21 Mr. Phillips circulated the exhibit list and the witness list
22 to all the parties, and I believe Ms. Eitel has had those, as
23 well as other parties.

24 **THE COURT:** Ms. Eitel, let me get this straight then.
25 You're a lawyer or you're a witness on the Gordon Arata?

1 **MS. EITEL:** I think I'm both, your Honor.

2 **THE COURT:** Okay.

3 **MS. EITEL:** I am going to be a witness for the ORIX
4 side and I'm also going to handle some of the objection. And
5 we can sort of talk about logistics once they get off the
6 stand.

7 **THE COURT:** I don't know if Mr. Rios or you are going
8 to handle objections to the exhibits.

9 **MS. EITEL:** We do not have objections --

10 **MR. RIOS:** No objection, your Honor.

11 **MS. EITEL:** -- to any of their exhibits. We have not
12 discussed it. I don't know if they have any to ours. We have
13 no objections to their exhibits.

14 **THE COURT:** Okay. So we're going to admit one
15 through 35-A without objection.

16 (**Gordon Arata's Exhibit Numbers 1 through 35-A were**
17 **received in evidence**)

18 **MR. PHILLIPS:** Your Honor, there are two volumes.

19 **THE COURT:** And then we'll admit 36 through 50.

20 (**Gordon Arata's Exhibit Numbers 36 through 50 were**
21 **received in evidence**)

22 (**Pause**)

23 **THE COURT:** Mr. Phillips, would you raise your hand,
24 please, sir?

25 //

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1 (LOUIS PHILLIPS, GORDON ARATA'S WITNESS, SWORN)

2 THE COURT: Thank you.

3 (The Court addresses counsel appearing in another matter)

4 (Louis Phillips takes the witness stand)

5 DIRECT EXAMINATION

6 BY MR. LEE:

7 Q State your name.

8 A Louis M. Phillips.

9 Q And what firm are you with?

10 A Gordon Arata McCollam Duplantis and Eagan, LLP.

11 Q And what is your relationship to the firm?

12 A I am a partner.

13 Q What is the business of Gordon Arata?

14 A It's a law firm that handles a variety of practice areas;
15 oil and gas, transaction oil and gas litigation, commercial
16 litigation, bankruptcy, transactional work.

17 Q Can you tell the Court how long you've been with Gordon
18 Arata?

19 A I started May 6th of 2002.

20 Q And prior to May 6th, 2002, what did you do?

21 A I was a bankruptcy judge from May 2nd, 1988, to May 1st, I
22 think, 2002. Prior to that I was first an associate and then a
23 partner with the firm of Taylor Porter Brooks and Phillips in
24 Baton Rouge, Louisiana, from 1980 until May of 1988.

25 Q Can you tell the Court what your relationship is with

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1 Mr. Rodney D. Tow?

2 A I was employed as special counsel to Mr. Tow in 2006, I
3 believe.

4 A And in that capacity, what was the kind of work you did
5 for Mr. Tow at the commencement of the representation?

6 A I was retained to act as Louisiana counsel in connection
7 with litigation that had been instituted by ORIX -- perhaps a
8 predecessor of ORIX but I'll call it ORIX for now -- in
9 Louisiana state court that came to be known here I think as the
10 SBE litigation.

11 Q Can you describe to the Court exactly what your role was
12 in that litigation?

13 A Well, the trustee wished to intervene in the state court
14 proceeding pursuant to a settlement that was reached by the
15 trustee and ORIX in the Bankruptcy Court. I assisted and
16 handled the intervention in the SBE litigation by the trustee,
17 and as well was Louisiana counsel for the estate in that
18 litigation. We did a couple, I think, of amended petitions.
19 There were a number of proceedings that were handled in the
20 state court. I handled some of those proceedings on behalf of
21 the estate. We kind of mixed the work up, with ORIX handling
22 some and I was the Louisiana lawyer handling them in Louisiana.

23 Ultimately, the Louisiana litigation involved a
24 motion to -- an exception under Louisiana procedural law for
25 want of personal jurisdictional filed by several of the

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1 defendants, asserting that they were out of state residents and
2 were not subject to Louisiana state court jurisdiction
3 personally. And we assisted in that.

4 There were also several other exceptions that I
5 handled for the trustee, but the litigation resulted -- the
6 exceptions were granted on the exceptions to personal
7 jurisdiction, which resulted in the dismissal of a number of
8 the defendants. And after that, I worked with the team to, I
9 guess the best way to say it, is to try to figure out what to
10 do, since you had a pending lawsuit against a number of
11 defendants who were subject to *in persona* jurisdiction in
12 Louisiana but you didn't have a lawsuit against the other ones
13 against whom the estate and ORIX wanted to proceed.

14 There were issues about whether or not to appeal. I
15 think there was an appeal of the denial -- dismissal of the
16 litigation. There were also a lot of exceptions filed that
17 still had to be dealt with. And I think it was about June of
18 2007 when that component of my representation basically ended,
19 and it ended with the decision having been made to move the
20 litigation to Texas. We assisted in effectuating dismissal
21 without prejudice of the lawsuit that was in Louisiana, which,
22 frankly, was a pretty good stroke because there was some
23 authority that gave the Court discretion as to whether or not
24 to dismiss without prejudice. But that litigation was
25 dismissed without prejudice. And then --

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1 Q Mr. Phillips, I'm going to interrupt you for just a
2 minute.

3 A Okay.

4 Q The dismissal of many of the defendants based on personal
5 jurisdiction occurred in January of 2007, correct?

6 A I think so.

7 Q And that was Judge Grant who granted --

8 A Yes.

9 Q -- that relief?

10 A Yes.

11 Q And then when you spoke of the other relief and the
12 remaining exception, that was also in Judge Grant's court --

13 A Yes.

14 Q -- that went through the summer of 2007?

15 A Yes.

16 Q Okay. Now, those portions of the fee applications are not
17 being objected to by ORIX today, are they?

18 A No.

19 Q Okay. Let's go to --

20 A They were made subject to a prior fee application as well.

21 Q Let's talk about your present fee application --

22 A All right.

23 Q -- all right? How many -- how much in amounts are you
24 seeking in this final fee application of yours?

25 A Sixty eight thousand nine hundred dollars and 75 cents.

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1 Q Okay. And insofar as out-of-pocket expenses are
2 concerned, how much in out-of-pocket are you seeking for this
3 period of time?

4 A Thirteen hundred ninety one dollars and 30 cents.

5 Q Now, tell the Court the kind of work you performed that
6 resulted in the estate incurring \$68,000. When did that --
7 First of all, let's talk about when did it begin?

8 A I think the first time I billed was November 1st of 2007.

9 Q What was that for?

10 A That was a communication from the trustee about ORIX's
11 claim and a nullity action filed under Louisiana state law in
12 the 24th Judicial District in Louisiana, Jefferson Parish.

13 Q Okay. And when you say 'a nullity action', describe
14 briefly --

15 A All right.

16 Q -- for the Court what that is.

17 A It was an action seeking to annul the judgment that gave
18 rise to the ORIX claim on the basis that ORIX had withheld a
19 particular piece of evidence or some piece of evidence. And,
20 had the judge known about that evidence, the outcome would have
21 been different.

22 Q Mr. Phillips, prior to November of 2007, had you heard
23 about this nullity action in any way?

24 A Not that I remember.

25 Q Okay. So did Mr. Tow contact you in order to get you

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1 involved in the nullity action?

2 A Yes, I guess so.

3 Q Okay. And what were you supposed to do for him?

4 A Well, I didn't really know anything about it, so the first
5 thing I was supposed to do was find out what was going on. And
6 I think that we had a couple of phone calls early in November
7 and then we found out that there had been a nullity action
8 filed in state court by the debtors in these bankruptcy cases.

9 ORIX had removed the nullity action to federal
10 district court. There had been a motion to remand and ORIX
11 responded to the motion to remand with a motion to dismiss or
12 alternatively to transfer venue to this Court. The hearing
13 date was November 14th.

14 Q Did you make an appearance at that hearing?

15 A No.

16 Q Did you file any pleadings in connection with that
17 hearing?

18 A No.

19 Q What happened --

20 A No, I did not.

21 Q Okay. What happened at the November 14th, 2007, hearing?

22 A There wasn't a hearing. The district court only takes
23 argument if it asks for it. I didn't know anything about the
24 substantive component. The motion to dismiss was basically on
25 the basis of *res judicata* and no standing on the part of the

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1 debtors to bring the nullity action.

2 I obtained agreement to a continuance of the hearing,
3 and I think the debtor's counsel filed a consent motion to
4 continue on November 13th, and the district court denied the
5 continuance and issued a ruling on November 13th dismissing the
6 federal court action.

7 Q Mr. Phillips, why are you being asked by the trustee in
8 November of 2007 to get yourself involved in the nullity
9 action? What impact did this action have on the estate?

10 A The nullity action, there was a judgment, number one, in
11 favor of ORIX for several million dollars. The judgment had
12 been appealed prior to bankruptcy, but it was executory because
13 no bond had been posted, and the suspense of appeal under
14 Louisiana law had not been granted. But an appeal had been
15 docketed. And I think it was abated when the bankruptcy case
16 was filed, or something happened. But as I understood it,
17 there was an appeal, and the nullity action would have gone to
18 the question of the amount of the judgment and whether or not
19 the ORIX claim would be subject to retrial, in essence, I guess
20 here.

21 Q All right. So it had to do with a way of potentially
22 disallowing a claim in the bankruptcy?

23 A At least looking into whether or not the claim should be
24 disallowed within the context of the claim being the claim as
25 opposed to the claim having been reduced to judgment.

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1 Q Okay. Now, did the district court in Louisiana take any
2 action around November 13th or 14th, 2007, in the nullity
3 action?

4 A Yes, it dismissed it. It dismissed the lawsuit.

5 Q Did you evaluate for the trustee the basis for the
6 dismissal?

7 A Yes.

8 Q And what were the conclusions that you reached with
9 respect to the dismissal?

10 A It looked like it was wrongly decided.

11 Q The dismissal itself --

12 A Yes.

13 Q -- or the basis of the dismissal?

14 A Both. I mean, the dismissal was wrongly decided. The
15 Court decided it based upon a presentation of what had gone on
16 in front of this Court, and it's argument -- ORIX's argument
17 was that this Court had ruled, I think by January 5th order,
18 that the debtor's claim under the nullity action right was
19 dismissed and that that constituted a dismissal with prejudice,
20 and therefore the nullity action had been decided and *res*
21 *judicata* precluded relitigation of it.

22 Q And did the trustee disagree with that position?

23 A Yes.

24 Q Could you tell the Court on what basis it disagreed with
25 that position?

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1 A Well, on the basis that after the January 5th order, and
2 this is in adversary proceeding 05-03715. These are documents
3 28 through 30 -- 28, 29 and 30.

4 **THE COURT:** Give me that, 0305 --

5 **THE WITNESS:** 05-03715. And the documents are 28 and
6 29, and then there's another document, 30, which came later.

7 But what had not been given to the district court was
8 a February 2 order which seemed to interpret the January 5
9 order.

10 The other thing that had not been briefed, and this
11 was not ORIX's fault; it was trying to get the case dismissed.
12 But I had concerns that the district court had jurisdiction
13 even to take up dismissal on a substantive matter because of
14 the *Barrow* case which we cited in our -- ultimately in our
15 pleadings. The prohibition on a federal court taking
16 jurisdiction over a nullity action or an action grounded fraud
17 or ill practices, which is the basis for the Louisiana nullity
18 action.

19 Q So in 2007, did you file any pleadings with the district
20 court in respect of your views?

21 A Yes, I did.

22 Q Okay. What did you file?

23 A On November 14th the trustee filed a motion to have me
24 supplementally employed, and I believe on the 27th of November
25 -- the 27th or the 29th -- I filed two things. I was bound by

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1 the Rule 59 deadline. I filed -- And the trustee was not a
2 party, so I moved to intervene and also moved for new trial.

3 Q Was this in your view a way to make sure that certain
4 things did not happen as a result of the trustee not taking any
5 legal action in a nullity suit?

6 A Yes.

7 Q Okay. Let's talk -- Did you do anything else in
8 connection with this nullity suit in 2007, to the best of your
9 recollection?

10 A No. We filed those papers, and I've gone back and looked.
11 My second fee application contained -- that's document 24, your
12 Honor. My second fee application contained the time spent in
13 connection with the federal court action. And I think it was
14 basically -- what we basically did was we dealt with -- we
15 dealt with the procedural posture of the case. We filed our
16 pleadings on the 27th of November, and we -- I mean, we didn't
17 have a nullity action at that time.

18 Q Okay. Mr. Phillips, do you recall whether or not in the
19 present objection that ORIX has filed to your final fee
20 application whether it has objected to that time associated --
21 that you spent time in the second interim application on the
22 nullity suit?

23 A Not that I can see.

24 Q Okay. They did not object to that?

25 A No.

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1 Q Now, let's talk about what you did for the trustee in
2 2008.

3 A All right.

4 Q Can you categorize that work you did for the trustee,
5 please?

6 A As I have gone through my application, I've broken it up
7 into categories. Number one, completion of the federal court
8 litigation.

9 Q And what do you mean by 'the federal court litigation'?
10 Is that the nullity suit?

11 A I call it the federal court nullity action in my reply to
12 the ORIX objection to my fees. We had to finish. We had a
13 briefing deadline. I think ORIX's brief in opposition to our
14 motion for new trial was filed the first week of January. We
15 filed a -- We also filed a supplemental brief at the end of
16 December because this Court issued what we've termed a
17 clarification order, and I believe that's document number 30.

18 By the end of December, that order was entered, and
19 we submitted that order to the Court as well through a motion
20 to supplement our briefing.

21 Q Okay. Why was it necessary for you, the trustee, to file
22 pleadings when the lawsuit was being prosecuted by the debtor?

23 A Well, the trustee -- I would say that the pleadings before
24 the Court, my application to be supplemental employment said
25 that the estate might have an interest in determining the

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1 nullity action and the ORIX claim. Then there were proceedings
2 here, I think. There was a contempt motion filed by ORIX in
3 response to the debtors having filed the nullity suit in state
4 court. That came up for hearing I want to say in November.
5 The motion for contempt is number 11, and the order denying the
6 motion for contempt is number 14 of the document package.

7 And in the motion for contempt, general counsel for
8 the trustee appeared, and, as I understand it and as the order
9 denying the motion for contempt says, the trustee and the
10 debtors would submit a joint prosecution order to the Court
11 dealing with prosecuting the nullity action. This was -- I
12 believe it was in November. Maybe -- It was right when I filed
13 my papers, I think.

14 Q November of 2007?

15 A Yes.

16 Q Okay. So besides filing this additional supplemental
17 briefing in the end of December 2007, focus with me on what --

18 A I will, I will.

19 Q -- you did, in a brief way, what you did for 2008 for this
20 trustee.

21 A Well, you asked me about how to complete the federal court
22 action.

23 Q Right.

24 A ORIX filed its brief and we filed -- we filed a motion to
25 reply to ORIX's brief, and the motion was granted. And we

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1 filed a reply to ORIX's opposition the first week of January of
2 2008.

3 Q Okay.

4 A And I think at that point the motion to dismiss was
5 submitted. So when I say we had to finish the federal court
6 action, we had to finish the federal court action; it was still
7 pending. And the briefing had not been done. ORIX had not
8 filed its brief. The clarification order was entered. We had
9 to -- We felt like we needed to reply to ORIX's brief once it
10 was filed, and we did.

11 Q Besides filing the reply, what you just talked about --

12 A Uh-huh.

13 Q -- tell the Court what other substantive areas of work --

14 A Okay.

15 Q -- you did for the trustee in 2008 that's covered by this
16 application.

17 A All right. That takes care of finishing the district
18 court litigation.

19 Q Right.

20 A I think we looked at the Judge's ruling and gave it to the
21 trustee, et cetera. But we were also supposed to looking into
22 the nullity action, the merits of it.

23 Q Okay.

24 A I didn't know anything about it because I wasn't involved
25 in the trial. We got started in January.

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1 Q Of 2008?

2 A Right. So one of the categories of work in 2008 is
3 looking into or analysis of the nullity action. Another
4 category of work is looking into and analysis of the ORIX
5 claim, not from a position of nullity but assuming that the
6 judgment was valid.7 Another component of our work was -- And I don't
8 think ORIX has opposed this -- was acting as kind of an
9 independent person dealing with the funding agreement
10 negotiations.

11 Q Okay, what else?

12 A I assist -- Well, I don't know if I assisted, but I
13 participated in, to a limited extent, the Rule 9019 proceeding
14 that was brought before this Court I believe in March.

15 Q Okay, what else?

16 A In the state court litigation, ORIX filed a summary
17 judgment motion and we filed a -- we participated in that. We
18 filed an opposition. ORIX replied. Mondona and the debtor --
19 Mondona Rafizadeh and the debtors filed oppositions. We filed
20 an opposition. ORIX replied to Mondona and the debtors'
21 oppositions. Ms. Eitel sent me an e-mail saying that we had
22 made a false statement in ours. I looked at it; it was not a
23 correct representation. There was a problem with our brief. I
24 fixed it, gave it to my associate who was handling that hearing
25 because I had a pre-existing thing.

1 Q Okay.

2 A But we were involved in the summary judgment litigation,
3 which included, after the hearing, where we orally withdrew our
4 opposition, filing a formal withdrawal of our opposition to
5 summary judgment in the nullity action.

6 Q Right.

7 A That was in June of 2008.

8 Q And that's all covered in what you're seeking today, the
9 \$68,900.75?

10 A Yes. And there was one other -- there were a couple of
11 other things. The last thing, a big piece of time, is that
12 after the summary judgment was rendered, ORIX filed a motion
13 for new trial in the state court litigation seeking against the
14 debtors sanctions and prevailing party fees and against the
15 trustee prevailing party fees. And we opposed that on behalf
16 of the trustee.

17 Q Tell the Court what benefit your work conferred upon the
18 trustee and this estate that you just described.

19 A Well, the trustee, I thought, was in a very difficult
20 position. He was co-plaintiff with ORIX in the big litigation
21 here. He was also trustee. I got contacted by the trustee and
22 part of his charge was to look into the nullity action and the
23 claim of ORIX. I was --

24 Q So, would you say it would be fair to say the claims
25 allowance was one of the issues that you were analyzing?

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25

1 A Well, that was the issue I was hired to do. For some
2 reason, I was asked to be deposed and to testify in connection
3 with the 9019 action, and I came here to -- I don't know, I'll
4 have to leave it to you to determine the benefit of that, but I
5 came over here so I could be deposed by Ms. Eitel in Houston,
6 and then I was asked to testify and I've charged for that time.
7 And there was a little other time where I just communicated
8 with you while you were doing that 9019 action.

9 Q So Mr. Phillips, I'm going to ask you again. Tell the
10 Court what the benefit you conferred upon in connection with
11 the claims allowance by working for the trustee on that matter.
12 Tell the Court what that was. What was the benefit?

13 A Well, I felt like I had to right the situation in the
14 federal district court. The federal district court process I
15 didn't think had been a knowing process. It was told things
16 that had gone on here, and I don't think it was given the clear
17 picture.

18 Q Okay. That's number one. What other benefits did you
19 confer upon the trustee?

20 A I maintained or assisted the trustee in maintaining an
21 independent posture. It was a hard case; ORIX was the big
22 creditor. The other creditors were going to get paid through a
23 fund that everybody, including myself, had subordinated to, or
24 at least I did and I think ORIX did. But Mr. Tow was a
25 plaintiff and Mr. Tow believed that -- a plaintiff and a

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1 trustee. Mr. Tow believed that part of his duty as a trustee
2 was looking into the claim of ORIX.

3 There was no, as I understood the litigation, no one
4 knew what was going to be recovered. And no one knew whether
5 or not there would be enough money to pay the claim or there
6 would be a lot of money over the -- And no one knew, but
7 Mr. Tow decided that it was necessary to do an evaluation of
8 the claim.

9 The claim was a Louisiana law claim, and so we did
10 two things. After the federal court litigation was over, we
11 investigated the best we could the nullity action. There was
12 also a joint prosecution order issued by this Court in May of
13 2008, which was presented to the Court by the trustee's general
14 counsel. We complied best we could with the joint prosecution
15 order.

16 But primarily, I think, what we did -- I know what I
17 tried to do was maintain an independent posture. And once I
18 got involved in the joint prosecution, I had -- I was bound by
19 it. We met with debtors, we met with their lawyers on several
20 occasions. I've gone back and looked; the joint prosecution
21 order is very -- very rigid. I mean, we would have to come
22 back to the Court for all kinds of things.

23 We lost the summary judgment. We withdrew the
24 summary judgment opposition. We won the prevailing party. I
25 don't know if there was a monetary benefit because ORIX is the

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1 big creditor, and if ORIX has a bigger or smaller claim, maybe
2 it makes a difference, maybe it doesn't. But Mr. Tow was
3 pretty well vilified, along with me, in the prevailing party
4 motion, and I felt like we needed to oppose it, and we opposed
5 it and it was unsuccessful.

6 Q What other benefits that you can recall did you confer
7 upon the estate by virtue of your work that's covered here in
8 this fee application? Anything else that the Court should know
9 about?

10 A Well, I took up for the Court --

11 Q Okay.

12 A -- in the federal district court litigation.

13 Q And --

14 A ORIX said that the Court had issued an improper advisory
15 opinion in the clarification order and that the district court
16 ought to ignore it, and we showed in our reply that that was
17 legally incorrect, and we showed by focusing on the
18 clarification that it was factually incorrect.

19 Q All right. Anything else, Mr. Phillips?

20 A Well, I think it was necessary to have an independent
21 person involved in the funding agreement; that's not been
22 objected to. Neither has our work on the claim been objected
23 to. Although I have to say that our work on the claim and on
24 the nullity action was overlapping because we did a lot of work
25 reviewing trial transcripts of the state court action that

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1 generated the ORIX judgment, reviewing exhibits.

2 We made a determination that we thought there was,
3 given the appellate review standard in Louisiana state court,
4 probably only one component of the ORIX claim, or two, that
5 could be objected to if the judgment was valid. One was some
6 type of evening-up penalty amount or something, and the other
7 was post-judgment attorney's fees I didn't think they were
8 entitled to. But that was a million something dollars worth of
9 reduction that could ultimately be done, but it wasn't relevant
10 until -- it could be relevant. It could be relevant to get the
11 claim fixed ultimately. It could be relevant to the amount you
12 were chasing in the federal court -- I mean, in the adversary
13 proceeding.

14 Q Have you reviewed the objection filed by ORIX to your
15 final fee application?

16 A Yes.

17 Q All right. Can you -- Do you have a copy of that
18 objection in front of you?

19 A No.

20 Q Okay. It's document number 957.

21 Have you addressed the objections in some ways for
22 this Court?

23 A I've tried to. I filed a reply.

24 Q All right.

25 **MR. LEE:** Should we go through the reply right now or

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1 will there be too many things that you believe you've already
2 spoken about which doesn't need to be covered in a reply?

3 **THE COURT:** I've read the objection and I also read
4 the reply this morning. So, I don't know if that -- You're
5 welcome to go into it, but just so that you know, I did have a
6 chance to read it this morning.

7 **BY MR. LEE:**

8 Q Mr. Phillips, what I'm going to do is, I'm going to give
9 you a copy of your reply. I want you to take a look at it for
10 a minute and tell us if there are any other things that you'd
11 like to give some oral testimony on in connection with the
12 reply that you've missed in your testimony today.

13 **MR. LEE:** May I approach, your Honor?

14 **THE COURT:** Yes, sir.

15 **BY MR. LEE:**

16 Q Mr. Phillips, will you take a look at your objection,
17 which I've just -- the reply I've just handed you and let me
18 know if there are certain pages on which points are made that
19 you want to highlight for the Court that you were not able to
20 do so with your testimony today.

21 A What I've tried to do in the reply was break out the
22 components of the objection. The Court has read the reply. It
23 would be just repeating numbers.

24 I tried to break out that I didn't understand the
25 objection which says it doesn't oppose my 2007 time because I

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1 was looking at the ORIX nullity action when I wasn't. I was
2 doing the federal court action in 2007. I started looking at
3 the nullity action early in 2008, in January, and was
4 immediately pretty well called off by the trustee, who advised,
5 'Stop doing what you're doing. I've been to a mediation and I
6 may be settling this thing', the overall litigation.

7 So I did, and we didn't resume our work until -- We
8 had a little bit of time but it was basically dealing with the
9 settlement and how to work in the fact that I think under the
10 settlement the debtors were retaining the right to object to
11 ORIX's claim and how to deal with that; I had some involvement.

12 So the work I did looking at the nullity and the
13 claim was done basically a little bit of time before March, but
14 it was done basically the 20th of March through the 20th of
15 June.

16 Q Okay.

17 A And then we did the summary judgment; then we did the
18 prevailing party, and then I was out. I stopped until 2009,
19 tidying up after the settlement and doing the fee application.

20 Q Mr. Phillips, let me cut to the chase. The gravamen of
21 the ORIX objection is that you knew from day one that they had
22 provided the trustee and you with data in order to show to you
23 conclusively that the nullity action was totally without merit.
24 You knew that, according to the objection. You agreed with
25 that proposition and why it was necessary for you to incur

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1 these additional fees after ORIX gave you the data points on
2 that.

3 A Well, I didn't know that. I was involved in the federal
4 court litigation, which had nothing to do with the substance.
5 And I thought basically, after I dealt with the federal court
6 litigation, that I needed to see both sides. There was a joint
7 prosecution motion floating around or an order from this Court
8 to submit a joint prosecution order that didn't get done until
9 May of 2008, but it was always kind of the back of everybody's
10 mind. I didn't know quite how to handle it, but I felt like I
11 needed to look at both sides.

12 I will also say, although I thought that the nullity
13 action would be very difficult, given the fact that the trustee
14 had advised the Court that the trustee might have an interest
15 in looking into it; we had to look into it. And that involved
16 looking into both sides of it.

17 Ms. Eitel, as counsel for ORIX, sent me a package.
18 She did, at the end of November. But I was filing stuff. I
19 didn't have time to look, and I didn't think it was appropriate
20 to say that I'm not going to file anything to right a federal
21 court that made a wrong decision on a substantive basis when
22 the merits were not part of the action by ORIX in the federal
23 court. I made that call, and then, you know, I just -- I felt
24 like we needed to look into both sides.

25 Q And is that what most of the time you spent and you're

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1 seeking to recover here, is that what that was for?

2 A Well, about \$24,000 worth of time was spent looking into
3 the merits of the nullity action as best I can tell from my fee
4 application.

5 Q And what was the other portion of the fee application
6 attributable to? You have 68,000 --

7 A I have about \$7,100 involved in the summary judgment;
8 4,950 involved in the 9019 action; 9,572 involved in the
9 prevailing party motion; about 4,500 involved in finishing the
10 federal court action; and I think there's about 13,000 some-odd
11 that ORIX does not oppose.

12 Q How many hours have you spent in preparing to come here to
13 do this objection and respond to the ORIX objection?

14 A Well, probably 20 to 25. I've not kept it. I worked all
15 weekend and yesterday.

16 Q And what is your hourly rate?

17 A It's \$375 an hour.

18 Q In your final fee application, did you seek allowance of
19 any of those amounts --

20 A No.

21 Q -- in connection with this fee application process?

22 A No, I did not. I drove over here today; I did not fly, so
23 I'm -- I did not spend the night last night is the point. I
24 drove this morning.

25 Q Mr. Phillips, do you have any other observations you'd

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1 like to provide to the Court in support of your application
2 before I pass you as a witness?

3 A Well, the only thing I would say is that we did file -- we
4 did file an opposition to the summary judgment motion; filed in
5 state court. ORIX had filed a very detailed summary judgment
6 motion. I met with the Rafizadehs and their counsel pursuant
7 to Mr. Tow's request prior to the hearing on summary judgment,
8 prior to our filing a response on summary judgment.

9 We were subject to the joint prosecution order, which
10 is in the documents and which said that we would deal with them
11 and basically, if there was any dispute about anything --
12 discovery, tactics, filing things -- that it would have to come
13 before the Bankruptcy Court. They provided me with voluminous
14 amounts of documents, and we took it on ourselves to read the
15 trial transcript of the state court litigation, to go through
16 the evidence. You'll see big blocks of time with my associate
17 doing it.

18 I was not available on the date for the hearing on
19 the summary judgment, and I was not really available for the
20 two or three -- Well, I met with the Rafizadehs, but I was
21 trying to get a Chapter 11 case up for confirmation on the 25th
22 of June.

23 We knew about the summary judgment motion having been
24 filed in April. We didn't know about the date of the hearing.
25 When I found out, I said, 'I'm not going to be there.'

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1 Ms. Eitel properly said, 'You knew about the motion.' I said,
2 'You're right.' I just didn't know when the hearing date was
3 because we weren't served with the rule to show cause as is
4 required. But frankly, we intervened in the federal court
5 action; it was granted. That must not have been reflected in
6 the state court action.

7 We did not get formal service but we did not oppose
8 the hearing date.

9 Q Okay.

10 A I asked for an extension of time to file a reply. I met
11 with the Rafizadehs I think on the 22nd of June. They came up
12 with an argument about the summary judgment, that the report
13 that was supposedly not turned over was a 1999 report.

14 The material sent by ORIX was very detailed; had this
15 Mr. Bomar's name all over it. It also had 2000 in it, and it
16 had other things. And the debtor said, 'Look at all of the
17 stamps. The stamps don't show the exhibit number from the
18 deposition that he was supposedly testifying about.'

19 My associate basically did the opposition because I
20 was not available. It's my bad if I missed the sentence. I
21 have to say that when Ms. Eitel sent me the e-mail saying that
22 we had a false statement in our brief in opposition to the
23 summary judgment, I didn't remember it, and I didn't -- whether
24 I missed it when I was reviewing it, I don't know, but it did
25 not properly reflect, and we have shown the Court what we --

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1 what I fixed the morning before the hearing. At 2:00 o'clock
2 in the morning I went to the office and fixed it.

3 We took the position that if, in fact, the report was
4 the report, they win. As I understand what happened at the
5 hearing -- I wasn't there -- Ms. Eitel did her customarily fine
6 trial job; showed that all versions of the report, including
7 the one with the exhibit sticker relating to the deposition,
8 were the same thing.

9 At that hearing, I think Super Future Equities made
10 an appearance; asked for a continuance. We opposed it. At
11 that hearing, upon argument, as I understand it, my associate
12 advised the Court we would be withdrawing our opposition to the
13 summary judgment. We did follow it up the next day with a
14 formal withdrawal of our opposition to the summary judgment.
15 Summary judgment was granted.

16 I felt like we could do that under the joint
17 prosecution order because that was not us withdrawing from the
18 nullity action, which we couldn't do without this Court's
19 approval. But I didn't think the joint prosecution order
20 required that in the face of something I knew to be that I'd
21 have to take an opposing position.

22 Q Okay.

23 A We withdrew it. If we messed up, we messed up.

24 Q And along those lines, Mr. Phillips, are you here today
25 willing to tell the Court if you are willing to take some type

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1 of a voluntary reduction to your fee application associated
2 with the issues that have arisen?

3 A Well, I offered that last week to keep from having this
4 hearing. In fact, I offered a reduction of more than the
5 amount we spent on the summary judgment hearing to keep from
6 having to come. You know, I'm here because I have to be. What
7 the Judge rules, the Judge rules. I'm not going to spend any
8 more time on this than I have to, so if you're asking whether
9 I'm going to appeal the Judge's ruling, my guess is 'no'. I'm
10 tired.

11 Q Can you tell the Court whether it is your belief that your
12 work that's associated with the final fee application conferred
13 a benefit onto the estate?

14 A I think it did. I think it was very important for Mr. Tow
15 to be an independent trustee, and I tried my best.

16 **MR. LEE:** Pass the witness, your Honor.

17 **THE COURT:** Ms. Eitel?

18 **MS. EITEL:** Good morning, Mr. Phillips. I think it's
19 still morning by a couple of minutes.

20 **THE COURT:** What we're going to do is we'll go for
21 about 15 minutes and then we'll come back at 1:30. The 1:30 is
22 going to only take two or three minutes. That'll give you
23 another 30 minutes then, and then you-all may have to come back
24 although I'm hoping not.

25 **MS. EITEL:** Your Honor, we're fine. I'm on standby

1 for all day, whatever the Court can work in, and we're --

2 **THE COURT:** So let's do our best. So, take about 15
3 minutes for now.

4 **MS. EITEL:** And we're all big boys and girls; we can
5 handle the choppiness if the Court can accommodate us. Thank
6 you.

7 **CROSS EXAMINATION**

8 **BY MS. EITEL:**

9 Q Mr. Phillips, what was the benefit to the estate from
10 pursuing the nullity suit?

11 A I don't think -- And I guess an opposition, filing an
12 opposition to your summary judgment was pursuing the nullity
13 suit, but I didn't act as a litigant proactive except in the
14 federal court litigation. We didn't ask for discovery. We
15 didn't seek any depositions. We did an investigation based on
16 documents that were provided by you and provided by the other
17 side.

18 So, I pursued the nullity action to an extent in the
19 federal court litigation. I think the benefit to this estate
20 and to the process is that the federal district court made a
21 wrong decision, and it made a wrong decision based on, I think,
22 it's my belief, an incomplete record submitted to it.

23 All I did in the federal court litigation, it seems
24 to me is -- and the district court agreed; it reversed itself
25 on all points -- keep it alive so that I could look into it.

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1 That was what the trustee asked me to do.

2 Q So the trustee asked you to keep it alive so you could
3 look into it?

4 A Well, through the federal -- Yeah, to get to federal -- to
5 deal with the federal court litigation, after I told him I
6 thought it was wrong. No, he didn't say, 'Go fix that.' I
7 told him it was wrong and then he said 'Fix it.'

8 Q Okay. Now, on November 26th, 2007, you received a copy of
9 a letter that I wrote on behalf of ORIX, correct?

10 A I did.

11 Q And attached to the letter there is a production log from
12 the underlying foreclosure litigation, correct?

13 A There was.

14 Q And the production log showed a number of documents that
15 have introduced the Rafizadehs with specific Bates number,
16 correct?

17 A Correct.

18 Q And also attached to that November 26th letter was an OCM
19 document -- one of others, but OCM 5819. Do you recall that?

20 A The number. I mean, if you say you sent it to me, I'll
21 assume you sent it to me.

22 Q And --

23 A I put those e-mail -- I put that e-mail in my papers too,
24 so it's -- whatever it is, it is.

25 Q And attached also to that November 26th letter was a copy

1 of Mrs. Rafizadeh's trial Exhibit 22 from the 2004 litigation,
2 correct?

3 A Yes.

4 Q And between November 26th, 2000, and June -- excuse me,
5 November 26th, 2007, and June 26th, 2008, you made no further
6 requests for documents from ORIX related to the nullity
7 allegations, correct?

8 A I think that's right.

9 Q And you filed no formal request for production in the
10 nullity action either in state or federal court, correct?

11 A That's correct.

12 Q Now, you filed the motions for new trial in the suit when
13 it was removed to federal court on November 28th, 2007,
14 correct?

15 A Yes.

16 Q And you set the hearing for January --

17 A I think maybe it was the -- Was it the 28th or the 27th?
18 I've forgotten, but it was --

19 Q I believe it was the 28th of 2007; somewhere around there.
20 And you set them for hearing on January 9th, 2008, is that
21 correct?

22 A I believe that's right.

23 Q Do you recall advising ORIX that you had set them for
24 hearing on January 9th because that would hopefully give the
25 trustee time to analyze and review the nullity suit?

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1 A I may have said that. I may have said that hopefully it
2 would. It didn't.

3 Q Now, I think said earlier that you had not begun analyzing
4 the nullity suit until January of 2008, is that correct?

5 A Well, I don't think that's -- I mean, I didn't do much. I
6 know that I read your papers and I put in my reply that I don't
7 see any time for it. That's not an unusual occurrence for me;
8 I'm not a very good time keeper.

9 Q Well, let me be clear. The fee application that's before
10 the Court today is only for time from January 1, 2008, forward,
11 isn't that correct?

12 A That's correct.

13 Q But there are costs that go back to November 2007?

14 A Yeah, that weren't billed.

15 Q Okay.

16 A Right.

17 Q So in today's fee application, there's no time related to
18 November or December of 2007?

19 A Correct.

20 Q Okay. So my question when we started was why you waited
21 until -- You said you waited till January 2008 to review the
22 nullity suit, and you were explaining that maybe that was or
23 was not correct.

24 A No, I think it's correct. I think I looked at what you
25 sent, but I didn't have the experience of what had gone on. I

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1 haven't -- I hadn't even studied the nullity action. I just
2 found out about it in November. I was faced with a Rule 59
3 deadline and a motion of dismissal that had nothing to do with
4 the merits. And so what I did was address the matter at hand,
5 and I may very well have said, 'I hope I can look into this by
6 the hearing date.' But I didn't.

7 You filed -- We had the matter that was set here, the
8 clarification matter. We filed a supplement in the federal
9 court because we thought the federal court ought to hear about
10 it. You filed a reply. We didn't like your reply -- your
11 response. We filed a reply to your response. And at that
12 point, we had submitted it to the federal court.

13 And I think I started looking at material because I
14 communicated with the other side and asked them, you know, 'If
15 we win, what are you going to show me?' And they started
16 sending me stuff, and I looked at it, maybe -- I think my fee
17 app says on the 21st of November or the 9th -- I mean, January.
18 And then Mr. Tow contacted me -- Yeah, the 21st of January I
19 started looking over documents that Mr. Starr and Ms. McIlwe
20 from Louisiana, counsel for the debtors, had sent. And Mr. Tow
21 on the 22nd said 'stop'.

22 Q So you believed that you started reviewing the nullity
23 suit on January 21, 2008, and you were told to stop on January
24 22nd?

25 A I may have done a little bit prior to January 21st, but --

1 And I know that I read your stuff but I just didn't bill for
2 it, apparently. But I -- And I know I communicated with the
3 other side, but it was hard to get situated and get materials
4 back and forth, but --

5 Q When you say you read 'your stuff', you mean my November
6 22nd, 2006, letter --

7 A Yeah.

8 Q -- with attachments? Okay.

9 And you said the trustee told you to stop because the
10 trustee had settled the adversary proceeding on January 21,
11 correct?

12 A That's what -- I don't remember the dates, but my
13 application says that I got notice from Mr. Tow that he had
14 reached some type of settlement in principle with the -- in the
15 adversary proceeding and for me to stop. And I said 'okay.'

16 Q And did you understand that the trustee had assigned the
17 right to prosecute the nullity suit to the Rafizadehs as part
18 of the settlement?

19 A Yeah. I mean, I -- That's one way of looking at it I
20 guess. I think I was involved in some discussions about how to
21 handle the language about that, but --

22 Q But you understood the trustee had assigned the right to
23 --

24 A I understood that the trustee had either assigned the
25 right or had said he wasn't going to handle it anymore. In

1 other words, that it wouldn't be resolved by the settlement.

2 Q And then the 9019 hearing went forward on March 11, 2008.

3 Does that sound about right?

4 A Yeah.

5 Q And the settlement was rejected by the Court?

6 A That's what I understand, yes.

7 Q Now, ORIX filed its motion for summary judgment on April
8 24th, 2008. Does that sound about right?

9 A Yes.

10 Q And you received the ORIX motion and exhibits by e-mail
11 but not by service by the sheriff, correct?

12 A Correct.

13 Q And the exhibits to the ORIX summary judgment included
14 some of the same items that were attached to the November 26th,
15 2000, letter?

16 A Yes.

17 Q In fact, it included the production log?

18 A It included -- Yes, it's in there -- it's in our papers.
19 In the e-mail, your April -- I think your April 24th e-mail is
20 in my documents.

21 Q Right. And it included the copy of what ORIX said was the
22 Bomar report --

23 A Yes.

24 Q -- that it had produced, according to the production log,
25 and included a copy of Mrs. Rafizadeh's trial exhibit 22 from

Phillips - Cross / By Ms. Eitel

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1 the 2004 trial?

2 A Yes. The numbers, I'm assuming you're not trying to trick
3 me on the numbers.

4 Q I'm not trying to trick you on the numbers, but just in
5 terms of the substance; that's correct.

6 Now, that was April 24th, and the trustee, timely, as
7 we agreed, filed this brief on June 24th. Does that sound
8 right?

9 A Yes.

10 Q The day before the summary judgment hearing?

11 A Yes.

12 Q By agreement. And the trustee opposed ORIX's motion for
13 summary judgment, correct?

14 A The trustee did.

15 Q And in the opposition to the motion for summary judgment,
16 you represented that you thought there should be more time for
17 discovery to investigate the merits of the nullity suit,
18 correct?

19 A I think I said that.

20 Q And you've already talked earlier about the inaccurate
21 statement that you corrected on June 25, correct?

22 A I corrected a statement on June 25. I gave a redline to
23 my associate, who, as I understand it, delivered it to you and
24 to the Court at hearing.

25 Q Now, between the order of intervention on January 22nd and

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1 the summary judgment hearing on June 26th, the trustee had not
2 sought any discovery from ORIX?

3 A We did not.

4 Q And the trustee withdrew his opposition to the ORIX motion
5 for summary judgment the day after the hearing, correct?

6 A I think we withdrew it orally in court, but I wasn't
7 there. But we did withdraw it the next day.

8 Q And that was June 26th; that was seven months to the day
9 after ORIX had provided you its letter on November 26th, 2007,
10 showing the production log, the Bomar report and Mrs.

11 Rafizadeh's trial exhibit 22, which was a version of --

12 A It was seven; that's correct.

13 **MS. EITEL:** No further questions.

14 **THE COURT:** Thank you. Anything further?

15 **MR. LEE:** Nothing further, your Honor, except for
16 admission of the exhibits, which I think we did at the very
17 beginning.

18 **THE COURT:** We haven't admitted Ms. Eitel's exhibits.

19 Did you want to offer those?

20 **MS. EITEL:** Do you have any objections to any of
21 ours?

22 **(Pause - Ms. Eitel confers with Mr. Lee)**

23 **MR. LEE:** No objection.

24 **THE COURT:** I don't think I have them yet either.

25 **MS. EITEL:** I'm sorry, your Honor?

1 **THE COURT:** I don't believe I have a set.

2 **MS. EITEL:** Oh, I'm sorry.

3 Your Honor, we are offering, and admitting if we may,
4 ORIX Exhibits 1 through -- my number's right here --

5 **THE COURT:** One through 22.

6 **MS. EITEL:** -- 22.

7 **THE COURT:** And no objections, right?

8 **MR. LEE:** No objections, your Honor.

9 **THE COURT:** Exhibits 1 through 22 are admitted.

10 **(ORIX Capital Markets' Exhibit Numbers 1 through 22 were**
11 **received in evidence)**

12 **THE COURT:** You can step down, please.

13 **THE WITNESS:** Thank you very much, your Honor.

14 **THE COURT:** Thank you, Mr. Phillips.

15 May Mr. Phillips be excused to Louisiana?

16 **MR. LEE:** Yes, your Honor. I think --

17 **THE COURT:** He's welcome to stay, but if he wanted to
18 leave, he could leave, right?

19 **MR. LEE:** I just wanted to have him available in case
20 he wanted to make any closing statements for the Court.

21 **THE COURT:** I have no problem with him sticking
22 around, but he can --

23 **MS. EITEL:** He may be excused but we would like him
24 to stay.

25 **THE COURT:** That's fine.

1 **MR. PHILLIPS:** Do you want to do a closing?

2 **MS. EITEL:** If you want to rest on the brief,
3 Mr. Phillips, I'm perfectly comfortable accommodating you and
4 letting him get back, so whatever you want to do, I'm --
5 Whatever the Judge wants, whatever you want, I'm fine.

6 **MR. PHILLIPS:** I don't have anything else to say
7 unless the Court has any questions of me.

8 **THE COURT:** I don't know what Ms. Eitel is going to
9 testify to.

10 **MR. PHILLIPS:** Oh, okay; that's right.

11 **THE COURT:** So, we're going to adjourn till 1:30.
12 And then, Ms. Eitel -- it's a short hearing and then you're
13 going to take the stand, right?

14 **MS. EITEL:** I believe they're calling Mr. Tow next.

15 **THE COURT:** Oh, you're calling Mr. Tow?

16 **MS. EITEL:** Oh, no?

17 **MR. LEE:** We're not calling Mr. Tow.

18 **THE COURT:** So you're resting?

19 **MR. LEE:** We're resting.

20 **MS. EITEL:** Okay.

21 **THE COURT:** And are you going to call any witnesses
22 then?

23 **MS. EITEL:** Just myself.

24 **THE COURT:** You are going to call you.

25 **MR. RIOS:** Your Honor, yes, I'm going to call

1 Ms. Eitel. I would anticipate it would take about,
2 unfortunately, one hour.

3 **THE COURT:** Okay. It'll be a very choppy afternoon
4 as Ms. Eitel described it, but we'll -- just trying to do
5 deference to both Ms. Eitel and Mr. Phillips, we'll try and get
6 done this afternoon at some point. But you may get a lot of
7 interruptions, unfortunately. We'll see. 1:30 is going to be
8 short, and I think 2:00 may fall apart, too, so, we'll see how
9 things go.

10 **MR. LEE:** Thank you, your Honor.

11 **MS. EITEL:** Thank you, your Honor.

12 **THE COURT:** See you-all then.

13 **MR. PHILLIPS:** Thank you, your Honor.

14 **THE COURT:** Thank you.

15 **THE CLERK:** All rise.

16 **(Recess from 12:14 p.m. to 1:33 p.m.)**

17 **THE COURT:** Let's go back on the Rafizadeh matter.

18 **MR. RIOS:** Your Honor, ORIX calls Nan Eitel.

19 **THE COURT:** All right. Ms. Eitel.

20 Raise your hand.

21 **NAN EITEL, ORIX CAPITAL MARKETS' WITNESS, SWORN**

22 **MR. PHILLIPS:** Your Honor, Louis M. Phillips.

23 Would it be satisfactory to the Court if I acted as
24 counsel, as opposed to Mr. Lee?

25 **THE COURT:** That's fine.

1 **MR. PHILLIPS:** Okay. Thanks.

2 **THE COURT:** Just -- get the phone system set back up
3 right.

4 **(Pause)**

5 **THE COURT:** All right. Go ahead, please.

6 **MR. RIOS:** Thank you, your Honor.

7 **DIRECT EXAMINATION**

8 **BY MR. RIOS:**

9 Q Please state your name.

10 A Nan Eitel.

11 Q Ms. Eitel, can you spell your last name, please?

12 A E-I-T-E-L.

13 Q How are you employed?

14 A I am a partner of the Jones Walker law firm, now based in
15 Washington, D.C.; before Hurricane Katrina, out of New Orleans.

16 Q And what is your connection to the case before the Court?

17 A I represent ORIX Capital Markets in its role as a special
18 servicer for the MLMI Trust since early 2002. I actually filed
19 the foreclosure litigation in Louisiana state court against
20 Cyrus and Bahar Development and Mrs. Rafizadeh. I was there
21 when the receiver was appointed. I actually co-tried the case
22 in Louisiana state court in July, 2004, that went to judgment
23 in the end of 2004; represented ORIX again in post-judgment
24 litigation regarding that; and then, once the bankruptcy was
25 filed, acted as co-counsel with the Winstead firm initially;

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1 then, when they were disqualified, became co-counsel with the -
2 - at some point in the Munsch Hardt firm in the bankruptcy
3 proceeding.

4 Q So, you have been involved in this case from its inception
5 for seven plus years?

6 A I have. I think I am the only one still standing.

7 Q Now, I'd like to get to the objection to the Gordon Arata
8 fee application that the Court is hearing today.

9 Can you summarize for the Court the different bases
10 for the objection that ORIX has filed?

11 A There are two principal bases for the objection. The
12 first relates to fees and expenses for the nullity suit. The
13 trustee intervened in the nullity suit that was filed in
14 Louisiana state court by Mrs. Rafizadeh as a plaintiff, and
15 that's about \$50,000 and some change in fees.

16 The second basis for the objection, a much smaller
17 objection, is about \$4,000 related to the rejected compromise
18 the trustee reached in January, 2008, and it was disapproved in
19 March, 2008.

20 Q Ms. Eitel, this -- the fee application today is a final
21 fee application, correct?

22 A Yes.

23 Q And ORIX has not objected to any fees or expenses that
24 were previously awarded by orders of this Court.

25 A That's correct. We did not go back and object. We didn't

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1 think we had a basis to object to time that was spent before
2 January, 2008.

3 Q All right. Let's talk about the first category that are
4 subject to ORIX's objection, namely, the nullity suit.

5 Can you briefly describe what the nullity suit is?

6 A Yes. Much like federal rules and federal law, Louisiana
7 has an action where you can annul a judgment if there was fraud
8 or ill practice in procuring of the judgment. It's a very
9 serious allegation. Mrs. Rafizadeh filed the nullity suit in
10 Louisiana state court in August, 2007, and in her lawsuit she
11 accused ORIX of having withheld or not produced documents that
12 were requested in discovery under the underlying guarantor and
13 foreclosure litigation that was tried in 2004. The principal
14 document that she mentioned in her petition that she says was
15 not produced was something called the "Bomar report" after
16 Henry Bomar, who worked for ORIX Capital Markets.

17 Q Were there any other bases that she sought to nullify the
18 judgment?

19 A Not that I'm aware of. It was basically the withholding
20 of documents, and basically the Bomar report was the one
21 document that she mentioned by description and name in her
22 nullity suit.

23 Q Okay. When did ORIX become aware of the nullity suit?

24 A August 14th, 2007, ORIX was served with it; or I should
25 say my law firm, Jones Walker, was served with it in the New

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1 Orleans office, and I happened to be in New Orleans working
2 that week, and we got the suit on August 14th.

3 Q In August of 2007 or shortly thereafter, what did ORIX do
4 when it became aware of the nullity suit?

5 A That very day we began the process of procuring the
6 discovery responses and requests from the underlying
7 litigation. Mind you, this is August, 2007. We had tried the
8 case in July, 2004, so it was three years post trial, two and a
9 half years post judgment. And we knew -- and the way that I
10 say that we knew that it just couldn't be true, because there
11 had been tens of thousands upon hundreds of thousands of
12 documents produced -- that there was just no way that that was
13 true. So, we started that process of trying to locate
14 documents, discovery requests, things that were archived.

15 The second thing that we did -- and I did it either
16 that day or the next -- I called Mr. Lee, the trustee's special
17 counsel for the adversary proceeding, and advised him of the
18 nullity suit, probably sent him a copy, and asked if the
19 trustee would get involved, because we believed, since it
20 related to a pre-petition judgment, that this was a pre-
21 petition cause of action and that Mrs. Rafizadeh did not really
22 have the right to be able to prosecute the nullity suit and
23 this should be the trustee's responsibility if anything was
24 going to happen. And we also wanted -- we thought it would be
25 best for the trustee to be involved.

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1 Q Did Mr. Lee advise of the trustee's position with respect
2 to the nullity suit on that date?

3 A Not that day, but he promised to get back to me very
4 quickly, and he did, as he always does, and sometime -- it was
5 either the next day or the next week; I'm not sure when -- he
6 said that he discussed the nullity suit with the trustee,
7 Mr. Tow, and I think, to paraphrase, he says, "You know, Rodney
8 says it's not his fight; he doesn't want to get involved."

9 Q Okay. Let me back up just for a second.

10 You testified about the fact that lawyers with Jones
11 Walker started reviewing documents that had been produced in
12 the underlying nullity -- or excuse me -- the underlying
13 Louisiana case.

14 A Right.

15 Q Was the purpose of the review to confirm whether or not
16 the Bomar report had been produced?

17 A Absolutely.

18 Q What did ORIX do next with respect to the nullity suit?

19 A We removed the suit to federal court in the Eastern
20 District of Louisiana, and our ultimate goal was either to get
21 it dismissed or to transfer venue here to the Southern District
22 of Texas for ultimate referral to the bankruptcy court.

23 Q Did ORIX take any action in connection with the nullity
24 suit here in bankruptcy court in Houston?

25 A We did. That same fall, around the same time, we filed a

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1 motion for contempt against Mrs. Rafizadeh, again, on the same
2 basis that we had asked the trustee to get involved; namely, we
3 believed this was a pre-petition cause of action that belonged
4 to her estate and not to her individually as a debtor. And,
5 so, we filed that motion and set it for hearing, and it was, in
6 fact, heard on November 5, 2007.

7 Q Now, Did ORIX believe that the nullity action was making
8 an end run at the claim objection process?

9 A Absolutely. And that was why we had filed -- one of the
10 reasons we had filed the motion for contempt and one of the
11 reasons we wanted the trustee involved, because essentially, if
12 the nullity suit were successful, it had the ultimate effect of
13 disallowing -- or could have the ultimate effect of disallowing
14 the ORIX claim, which had already in part been -- the secured
15 portion of which had already been allowed by an order of this
16 Court in 2006.

17 Q Do you recall the result of the contempt motion that was
18 filed against Ms. Rafizadeh?

19 A We did. We lost. The Court ruled against us and saying
20 that she was -- finding she was not in contempt, but there was
21 a development that we thought was also positive where the
22 trustee was ordered to develop a joint prosecution agreement
23 with Mrs. Rafizadeh and that the trustee needed to control the
24 nullity action for the same way that he controlled the
25 adversary proceeding in which ORIX was a co-plaintiff.

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1 Q After the November 5th hearing -- contempt hearing -- what
2 was the next thing that happened with respect to the nullity
3 suit?

4 A That was a very busy week, if you recall, October/November
5 2007, and I believe that we actually had some conversations in
6 the courtroom here and made arrangements to have a conference
7 call to discuss the merits of the nullity suit, how to proceed
8 with the trustee's team. I believe I spoke to Mr. Hill about
9 that here. I also learned, I think, that Mr. Tow wanted to get
10 Mr. Phillips involved, since it was a Louisiana matter, and I
11 believe that we set and, in fact, had a conference call on
12 Friday, November 9th, to talk about the nullity suit.
13 Mr. Phillips participated; I believe Mr. Tow participated; I
14 believe that Mr. Hill ended up having a conflict.

15 Q How did you leave things at the conclusion of that
16 conference call? Or, was ORIX supposed to do something?

17 A Well, what we agreed to on that call was the trustee said
18 he needed time to evaluate the nullity suit, and, as I
19 mentioned earlier, we had filed a motion to dismiss in federal
20 court and, alternatively, a motion to transfer venue to the
21 Southern District of Texas. The hearing date for those motions
22 was November 14th.

23 So, on November 9th the trustee said, you know, "I've
24 got this joint prosecution order, everybody that's going to be
25 involved; I just need some time" -- this is Friday, November

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1 9th; the hearing date's on Wednesday -- "can we continue it?"
2 And we did. We agreed to a continuance. I don't know what
3 duration -- a month, six weeks; I'm not sure -- to give the
4 trustee time to evaluate it. We also involved Mrs. Rafizadeh's
5 counsel in those conversations, and Mrs. Rafizadeh's counsel
6 had responsibility for drafting and filing the motion to
7 continue.

8 Q Okay. Now, we brushed on this just a little, a little
9 while ago, Ms. Eitel; the substance of the conversation that
10 took place on November 9th.

11 Do you recall --

12 A I do.

13 Q -- basically what was discussed?

14 A I think that we tried to explain to the trustee and his
15 counsel why the nullity suit had no legal or no factual basis
16 and was really wholly without merit; that he had no factual
17 basis because, as I mentioned earlier, we knew that we produced
18 thousands of pages of documents. By November 9 -- in fact, it
19 may have actually been on November 9 -- we had gone into a room
20 at the Munsch Hardt firm where all of the files from the
21 Winstead firm had been transferred and went through boxes and
22 boxes and boxes of documents with my associate and had pulled
23 out various Bates-numbered documents, different numbers of the
24 Bomar report, and shown conclusively that it was, in fact,
25 produced. And it was produced several different times under

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1 several different Bates numbers because the Bomar report was
2 maintained in different places for different purposes within
3 the ORIX things. So, we said: There is no merit to the
4 allegations that the documents were not produced.

5 Q What about legal basis?

6 A We also claimed that there was no -- even if
7 Mrs. Rafizadeh were absolutely right, that ORIX had done
8 something terrible and not produced the documents, there was no
9 legal basis for it, because one of the things that a nullity
10 plaintiff has to prove is that enforcement of the judgment
11 would be unconscionable and inequitable as to the plaintiff.
12 And our position was that it cannot be unconscionable and
13 inequitable because she had received her discharge. And she as
14 a discharge debtor would never have the judgment enforced
15 against her. So, she couldn't meet that element of the claim.
16 And, secondly, she challenged in the nullity suit that there
17 was information about the property was not in bad condition.

18 Back up for a second. The 2004 judgment found five
19 events of default with respect to the Cyrus II loan and eight
20 recourse carve-out triggers. One of those was the property was
21 in bad condition. And Mrs. Rafizadeh's nullity suit related
22 only to condition of the property, and it did not attack any of
23 the other four bases. So, even if everything she said were
24 right, the judgment would still stand independently; the things
25 like fraud and other defaults.

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1 Q Okay. Let's go back to the November 14th hearing that had
2 been scheduled in federal district court in Louisiana on ORIX's
3 motion to dismiss.

4 Did that hearing occur?

5 A It did not. What happened was the -- Mrs. Rafizadeh's
6 counsel filed the motion to continue on November 13th; and
7 although the submission date was November 14th, the district
8 court issued its decision a day early and entered an order
9 dismissing the nullity suit as ORIX had requested.

10 Q Okay. So, the case got dismissed --

11 A On November 13th. Yes.

12 Q -- notwithstanding the fact that ORIX had agreed with the
13 trustee to continue that hearing?

14 A That's correct. It's just -- I think what happened -- I
15 don't know for sure -- I don't think the motion to continue was
16 denied; I think it just didn't -- that Mrs. Rafizadeh's lawyer
17 didn't get it there before the judge had entered the order of
18 dismissal.

19 Q Okay. After the Louisiana court dismissed the case, what
20 did ORIX do next?

21 A Well, we had several conversations with the trustee's
22 team. You kind of come up on the Thanksgiving holidays; but we
23 promised the trustee's team that we would provide the written
24 analysis and documentary proof that the documents had been
25 produced. There was a call -- just, also, some context; ORIX

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1 had been asking the trustee to sort of lay it on the line with
2 what his position was with respect to the ORIX claim. It was
3 important for ORIX to know whether the trustee thought that a
4 couple of hundred thousand dollars of the ORIX claim was
5 objectionable or a couple of million dollars, because it needed
6 that information to assess how and how much time and money to
7 put into this fight. So, the trustee and his team asked some
8 specific questions about issues related to the claim. One part
9 of that conversation was the nullity allegations raised by
10 Mrs. Rafizadeh. Another part of that conversation related to
11 things like the prepayment yield maintenance premium.

12 So, on the Monday after Thanksgiving, November 26th,
13 I sent a letter that had been reviewed and approved by ORIX
14 that was addressed to Mr. Hill and copied to Mr. Phillips and
15 set forth, as we had in our phone calls, that the nullity suit
16 had no factual basis and had no legal basis, and I attached to
17 that correspondence the documents, in black and white, showing
18 the production of the Bomar report to Mrs. Rafizadeh and the
19 fact that Mrs. Rafizadeh had actually used it as a trial
20 exhibit in the 2004 trial.

21 Q Okay. Ms. Eitel, let me refer you to ORIX Exhibit 1.

22 A ORIX Exhibit 1 is the November 26th, 2007, letter that I
23 mentioned. It's the -- sort of our analysis and, you know,
24 piece trying to persuade the trustee that the Louisiana
25 judgment is on firm factual and legal footing and should not be

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1 challenged by him; and attached to it is the production log.

2 Q Is that page seven of 34 that's date stamped --

3 A Yes.

4 Q -- up at the top?

5 A It is page seven of 34 behind Exhibit 1 at the top.

6 That's exactly -- that's the first page of the production log.

7 And if you'll see two lines down, you'll see OCM,

8 lots of leading zeros and one, and documents through 7754.

9 They were produced August 1, 2002; copies arranged for by
10 Rubin. Matt Rubin at that time was Mrs. Rafizadeh's counsel in
11 Texas.

12 And, then, behind the production log you'll see a
13 file stamp, and you'll see some more Bates numbers. We were
14 probably over-inclusive in the documents we sent to the
15 trustee. We sent things other than the actual one-page 1999
16 Bomar report, but I think document OCM 5819 is what is the
17 Bomar 1999 report. But we sent other matters that were in the
18 same file to put it in context and not just to sort of cherry-
19 pick out the one piece of paper.

20 And, then, starting on page 27 of 34 on Exhibit 1
21 you'll see a very messy plaintiff's exhibit list. This was
22 Mrs. Rafizadeh's exhibit list as maintained by the courtroom
23 deputy at the July, 2004, trial, and behind it is a two-page
24 document, Trial Exhibit 22, and this is -- the first page is
25 the Bomar report from 1999, as admitted by Mrs. Rafizadeh, and

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1 if you look at the top left-hand corner, you'll see OCM 005 and
2 the beginning of the number "eight." It gets cut off. But
3 that's OCM 005819.

4 And, then, she paired it with an out-of-sequence
5 document, OCM 002573, which is a different document, but
6 updating the earlier 1999 report.

7 Q All right. Now, this letter was addressed to Mr. Hill,
8 correct?

9 A Yes, it was.

10 Q You testified that this also went to Mr. Phillips. Let me
11 refer you to ORIX Exhibit 2. And --

12 A Yes. If you'll look at the first e-mail in Exhibit 2, on
13 November 26th, 2007, I transmitted the ORIX letter with
14 attachments to Mr. Hill and Mr. Wentworth, and you'll see the
15 first cc on there is Louis Phillips. I also copied other
16 people, including Mr. Tow himself and his special counsel and
17 Diamond McCarthy in the adversary proceeding.

18 Q And, then, the top part of Exhibit 2, it appears as though
19 Mr. Hill forwarded your letter on to Mr. Rafizadeh's counsel,
20 Mr. Higgins?

21 A That's correct; with my permission. Mr. Hill asked if we
22 had any objection to sharing our analysis of that with the
23 Rafizadehs' counsel, Mr. Higgins, and I said absolutely not.
24 And, so, on December 20th he sent it to the Rafizadehs.

25 Q Okay. Now, you sent that letter on November 26th --

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1 A I did.

2 Q -- correct?

3 At any time between November 26th on, did anybody
4 from the trustee's team ever follow up with you and ask you
5 questions about the letter?6 A Never got a single question about the letter, never got a
7 single question about the documents, until the summary judgment
8 hearing seven months later.

9 Q Okay. Did anybody ask you for supplemental documentation?

10 A No. We had received no requests for additional documents
11 or explanation from the trustee regarding the package we had
12 prepared and sent.13 Q So, did anybody say, "These documents don't establish what
14 you believe they establish"?15 A Nobody ever challenged or contested that we had
16 established that the Bomar report was produced.17 Q Okay. What happened next, after you sent the November
18 26th letter, in connection with the nullity suit?19 A I believe -- the timing was such this letter went out late
20 of the night of the 26th. The trustee, as he testified, was
21 running up against a deadline to file a motion for new trial,
22 and he wanted to preserve his rights, and he told us he wanted
23 to preserve his rights in the event he needed to pursue the
24 nullity suit. So, the trustee on November 28th filed both a
25 motion to intervene in the suit as removed to federal court and

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1 a motion for new trial to reconsider the order of dismissal
2 entered on November 13th.

3 Q Now, those were filed in 2007?

4 A Yes.

5 Q And those are not part of any fees that ORIX is objecting
6 to.

7 A That's correct.

8 Q Is that correct?

9 A We understood the trustee needed some time, some breathing
10 room, to figure this out, and, so, he had to take that action
11 to protect the record, if you will, or protect his rights while
12 he evaluated the nullity suit.

13 Q Okay. Let me refer you quickly to ORIX Exhibits 3 and 4.

14 A Exhibit 3 is a trustee's motion to intervene filed on
15 November 28th, and Exhibit 4 is a trustee's motion for new
16 trial in the nullity suit, also filed November 28th.

17 Q Let me also refer you to ORIX Exhibit 5, please.

18 A Yes. Exhibit 5 is the transmittal e-mail that
19 Mr. Phillips sent to me on November 28th and said: Here are
20 the intervention papers we're going to file, and we're going
21 to -- given the time pressure, believe the trustee must file
22 the intervention along with a reconsideration request. And,
23 then, he said:

24 "We have attempted to provide the Court with a basis
25 for intervention of right that is essentially

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1 neutral, and, as you can see, the noticed hearing
2 date will be January 9, 2008. Hopefully, this will
3 give the trustee the necessary time within which to
4 perform analysis."

5 Q Okay. So, the hearing was scheduled for January 9th on
6 the motion to intervene and a motion to reconsider, correct?

7 A That's correct.

8 Q Did ORIX engage in any further conversations with the
9 trustee or the trustee's team between that time and the
10 hearing -- the date of the hearing on January 9th?

11 A No. I think the only request or communication was with
12 Mr. Hill when he asked to send my letter to Mr. Higgins in
13 December. But, other than that, there was absolutely no
14 discussion or communication about the nullity suit with the
15 trustee and the documents that we had sent.

16 Q Now, prior to the January 9th hearing, were there any
17 supplemental pleadings filed in the Federal District Court in
18 Louisiana?

19 A There were, and they related actually to actions taken
20 here in the bankruptcy court. The trustee had filed a motion
21 for clarification with the bankruptcy court as to whether any
22 prior orders of this Court precluded Mrs. Rafizadeh from
23 pursuing the nullity action in Louisiana. One of the bases for
24 our motion to dismiss that had been granted -- one was that our
25 claim had been partially allowed, and, so, the claim order was

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1 res judicata and she could not attack that claim allowance
2 order from 2006 on the secured portion.

3 Another bases of our argument was that she did not
4 have standing. And we based that on an order entered in the
5 dischargeability litigation where Mrs. Rafizadeh was denied
6 leave to amend her counterclaim, partly because it would be
7 futile because she didn't have standing or pecuniary interest.

8 So, the trustee sought and obtained a clarifying
9 order from this Court in late December, and then based on that
10 order filed a supplemental brief in further support of his
11 motion for new trial and reconsideration on January 2nd, 2008.

12 Q All right. Let me ask you to look at Exhibit 6, please.

13 A And Exhibit 6 is, in fact, the January 2, 2008,
14 supplemental brief of the trustee where he urges the Court to
15 consider this Court's ruling that there is nothing precluding
16 Mrs. Rafizadeh from prosecuting the nullity suit.

17 Q Okay. When ORIX received the exhibit -- excuse me. When
18 ORIX received Exhibit 6, what was its reaction?

19 A We were very concerned, a little frustrated, because we
20 had sent the trustee this pretty conclusive package of
21 documents on November 26th. We also were anticipating some
22 affirmative response, yea or nay, from the trustee by early
23 January. I think Mr. Phillips had hoped to do something by
24 January 9. And despite the trustee saying that he's trying to
25 be neutral in this matter, it looked like at this point he's

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1 really trying to keep the nullity suit alive, and we've gotten
2 no response to what we'd sent almost five weeks earlier about
3 the documents were produced. So, we were concerned about the
4 apparent effort to keep the nullity suit alive in the face of
5 really uncontradicted and irrefutable evidence the documents
6 were produced.

7 Q Well, did the trustee complete the analysis with respect
8 to the nullity action by January 9th, 2008, as Mr. Phillips
9 hoped he could?

10 A No. The only written response we ever got with respect to
11 the nullity suit was the opposition to summary judgment filed
12 the night before the hearing in June. It was almost seven
13 months before we got any written response. And it really
14 didn't go into the merits of it; it just said, "We need more
15 time."

16 Q All right. Let's turn our attention now to the failed
17 9019 motion. Let me ask you to take a look at ORIX Exhibit 7.

18 A Exhibit 7 is the term sheet that was e-mailed to ORIX and
19 to everyone on the morning of January 22nd by Mr. Lee. It's
20 not executed, and there was a subsequent amendment to it, but
21 this is the one that we received on January 22, 2008.

22 (Pause)

23 BY MR. RIOS:

24 Q Ms. Eitel, did the proposed settlement address the nullity
25 suit?

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1 A It did. One of the most disturbing terms in the
2 settlement agreement, to ORIX, at least, were the non-monetary
3 terms, and the trustee in the settlement assigned the right, I
4 guess, to the Rafizadehs or the settling parties, depending how
5 you define it, the right to prosecute -- the right to prosecute
6 the appeal of the judgment and the related nullity action and
7 any matters related to the appeal of the Louisiana judgment, as
8 well as the ORIX claim objection.

9 So, yes, effectively, the trustee transferred his
10 rights in the nullity suit that we had been trying to get him
11 to dismiss over to the Rafizadehs on January 21st.

12 Q What was ORIX's reaction to these components of the
13 proposed settlement?

14 A It was not pleasant. They were -- outrage might be --
15 might not be an overstatement; but just very disturbing to have
16 this kind of term negotiated and handed over to the Rafizadehs,
17 particularly when -- I say again -- nobody had ever challenged
18 the voracity of the evidence or the conclusiveness of the
19 evidence that the Bomar report had been produced.

20 Q Okay. Now, the hearing on the motion to approve
21 compromise was scheduled for March 11th --

22 A Two thousand eight.

23 Q -- 2008?

24 A Yes.

25 Q Did anything transpire between 1/22/08 when ORIX received

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1 a copy of the term sheet and the March 11th, 2008, hearing on
2 the 9019 motion?

3 A During that time we were, obviously, mostly focused on the
4 9019, but we were still concerned about the nullity suit. So,
5 on March 7th I wrote to Mrs. Rafizadeh's counsel and said, "I
6 think you already have the November 26th letter and attachments
7 I gave to the trustee, but in case you don't, here is a copy."
8 And it was a fairly strident -- maybe is not the right word --
9 but pretty tough letter to the counsel saying this lawsuit
10 doesn't meet the Article 863 standards for pleading. Louisiana
11 Article 863 is our equivalent of Rule 11. And I just wanted to
12 give them fair warning that we had conclusive proof that the
13 nullity suit was false and it was just factually wrong, and I
14 wanted to give them a chance to correct their error. At this
15 time the trustee's hands were tied about the nullity suit
16 because of the settlement, but I thought I would try to go to
17 Mrs. Rafizadeh's counsel directly.

18 Q And does that letter appear in the exhibit binder as ORIX
19 Exhibit 8?

20 A Yes. Exhibit 8 is my letter to Mrs. Rafizadeh's Louisiana
21 counsel.

22 Q Okay. What about the federal district court in Louisiana?
23 Did it take any action with respect to matters that were
24 pending before it during that 1/22/08 to 3/11/08 time period?

25 A It did. Ironically enough, on January 22nd, the same day

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1 that we learned of the trustee's settlement, the Louisiana
2 district court granted the trustee's motion to intervene, which
3 ORIX had not opposed, and also granted the trustee and **in**
4 Mrs. Rafizadeh's motion for new trial, and he vacated his
5 earlier judgment and remanded the nullity action back to
6 Louisiana state court. So, we were back at, you know, square
7 one.

8 Q You may have answered this, and I may --

9 **THE COURT:** Okay. I'm going to go ahead and -- I'm
10 going to go ahead and interrupt you now. We're going to take
11 our 2:00 o'clock.

12 You can either step down or stay there.

13 **THE WITNESS:** I'll --

14 **THE COURT:** I'm not sure how long we're going to be
15 at 2:00 o'clock.

16 Thank you.

17 **(Proceeding was recessed from 2:02 p.m. to 2:11 p.m.)**

18 **THE COURT:** All right. Mr. Rios. We're going until
19 about 2:27, and then I've got to go to a meeting at 2:30, and
20 then we'll just continue when we can.

21 **MR. RIOS:** I'm sorry, Judge. Did you say you have to
22 go to a meeting?

23 **THE COURT:** I have to go to a meeting at 2:30 here in
24 the courthouse, and I'll be back. And there'll be other
25 hearings, but I'm going to keep you going this afternoon. I'm

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1 just telling you, you all got until 2:27.

2 **MR. RIOS:** Judge, just to let the Court know where I
3 am, I'm about halfway through.

4 **THE COURT:** That's fine. I don't -- I'm really not
5 rushing you. I'm just signposting you.

6 **DIRECT EXAMINATION (RESUMED)**

7 **BY MR. RIOS:**

8 Q Ms. Eitel, we were previously discussing Orix Exhibit 8,
9 and I don't recall whether or not I asked you whether or not
10 Ms. Rafizadeh agreed to withdraw the nullity action.

11 A Her counsel rejected our demand and said they were going
12 to go forward the nullity suit.

13 Q Now, Ms. Rafizadeh -- excuse me -- I think you testified
14 that -- you did, that the 9019 hearing took place on March
15 11th, 2008.

16 A That's right.

17 Q What happened at that hearing?

18 A Well, Mr. Tow testified that he had put the nullity suit
19 as a plum on the table for the Rafizadehs to settle with him,
20 among some other things. That was one of the non-monetary
21 terms to which Orix had objected, and this Court ultimately
22 disapproved that settlement based on, among other things, the
23 non-monetary terms and Orix's views and the lack of deference
24 given to Orix's reasonable views.

25 Q All right. And let me ask you to take a look at Orix

1 Exhibit 9.

2 A Orix Exhibit 9 is an excerpt of the transcript from the
3 9019 on March 11th. It has the testimony I mentioned about
4 Mr. Tow having this as a plum out there for the Rafizadehs so
5 they would settle with him, and at the end, it has the Court's
6 oral rulings given at the conclusion of the hearing.

7 Q Wherein the Court emphasizes the non-monetary aspects --

8 A Yes, the --

9 Q -- of the compromise?

10 A The Court said that one of the problems he had was that
11 there was no consideration of Orix's reasonable views regarding
12 these non-monetary terms that were going to inflict injury on
13 Orix.

14 Q All right. Now, after the March 11th settlement hearing
15 on the 9019, did you approach Trustee's counsel to begin
16 discussions related to the nullity action and other matters?

17 A Yes. In fact, the very night of the 9019, you know, it
18 was a hard-fought battle. You know, it was a tough day for
19 everyone, equally respect on both sides. Couple of hours
20 later, I sent Mr. Lee an email and said, "Let's try to put this
21 whole thing back together again. Can we talk in the morning
22 before I leave down?" And he, very nicely, said, "Yes. Why
23 don't I come over to your hotel before you leave?" And so
24 Mr. Lee and Mr. Hirsch and I met over breakfast and coffee the
25 next morning, talked about a lot of stuff. I think I mentioned

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1 the nullity suit as sort of part and parcel of the things that
2 needed to be addressed. Certainly, the funding agreement
3 needed to be finalized and dawned, and then also, a strategy to
4 get back on board with the adversary proceedings. So that was
5 party step number one. I believe -- I can't recall with
6 particularity any particular conversations over the next few
7 weeks, but we did talk about the -- I'm fairly certain we
8 talked about the claim objection. And in fact, the Trustee,
9 through Mr. Phillips, sent us a memo on April 4th discussing
10 the Orix claim.

11 Q Was that the first conversation that you had with somebody
12 on the Trustee's side related to the Orix claim subsequent to
13 the March 11th hearing that you recall?

14 A (No audible response)

15 Q Let me strike the question. Was that the first
16 substantive discussion or communication that Orix received
17 regarding Orix's proof of claim?

18 A Yeah, the April 4th memo, yes. Absolutely. And it was a
19 memo from Mr. Phillips, and it addressed the issues -- not the
20 nullity suit, but it addressed the yield maintenance premium
21 default interest and, I believe, post-judgment attorney's fees
22 aspects of the claim.

23 Q Is that Orix Exhibit 10?

24 A Yes. The first is the email from Mr. Phillips that said,
25 "Here's a memo. Authorized to transmit." And then, that is

1 followed by a -- what, a five, six-page -- six-page memo from
2 Mr. Phillips analyzing the claim, but it doesn't deal with the
3 nullity suit. It just simply said, "We've provided our
4 analysis to the Rafizadehs of the nullity suit." We didn't get
5 it. They didn't tell us what it was, and they didn't give us
6 the written analysis.

7 Q Do you recall how Orix reacted to the memo?

8 A Once again, upset because by now, it's April, and we've
9 been asking the Trustee and telling the Trustee's team that the
10 nullity suit doesn't have any merit, and we just keep thinking
11 we're just getting delayed. And one of the things to remember
12 is the nullity suit is a very, very serious allegation. I
13 mean, you're accusing someone not just of fraud but of fraud on
14 a Court in a judicial proceeding, and you know, particularly as
15 a lawyer who was involved in the underlying litigation, we took
16 that very seriously, and it just was concerning to us that now
17 here we were five months later and just didn't have any
18 resolution with the Trustee.

19 **THE COURT:** Where in this memo does it refer to the
20 nullity suit?

21 **THE WITNESS:** Your Honor, I believe it's the final
22 page, when you flip --

23 **THE COURT:** Okay. That's the last paragraph?

24 **THE WITNESS:** Yes, your Honor, the final paragraph.
25 "As we have submitted to the Rafizadehs our analysis of the

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1 merits of the petition to annul judgment." And that's the only
2 portion of the six-page memo that mentions or addresses the
3 nullity suit. And so we were just very concerned. We had
4 provided the documents in November. Nobody had ever questioned
5 the documents. We were just frustrated, didn't really know --
6 we didn't want to litigate with the Trustee. We thought we
7 could just resolve this consensually, but it became very clear
8 as of April 4th that that was not going to happen.

9 **BY MR. RIOS:**

10 Q Ms. Eitel, as I understand, then the procedural posture of
11 the nullity suit as of April 2008, the case was now back in
12 Louisiana State Court.

13 A The case was back in the Louisiana State Court, and then
14 once the settlement had been rejected, it was the Trustee's and
15 Mrs. Rafizadeh's to co-prosecute together in state court.

16 Q What action did Orix take next with respect to the nullity
17 action?

18 A We decided to go ahead and file a motion for summary
19 judgment since we could not get a consensual resolution, and on
20 April 24th, Orix filed a motion for summary judgment, saying
21 that just as we had told the Trustee back in November 26th,
22 that there was no legal or factual basis for the nullity suit
23 and it should be dismissed.

24 Q Let me refer you to Exhibits 11 and 12, please.

25 A Exhibit 11 is Orix's motion for summary judgment filed

1 April 24th, 2008, and attached to it are the eight exhibits
2 that were our summary judgment exhibits. Exhibit 3 is an
3 affidavit of Jeff Joyce that basically attests to the things we
4 had told the Trustee, saying "Here's a production log and
5 here's documents that were produced to the Rafizadehs." So the
6 Trustee had had that. And Exhibit 6 was Mrs. Rafizadeh's Trial
7 Exhibit 22. A couple of other things in there were the trial
8 transcript, which the Trustee, he had had, Mr. Phillips said
9 they had been reviewing. And on the trial transcript -- I
10 think that's Exhibit 7 -- you have Mr. Schuman Rafizadeh
11 testifying about the 1999 Bomar (phonetic) report, Trial
12 Exhibit 22.

13 Q Okay. So most of the exhibits that were attached to
14 Orix's motion for summary judgment were the very same documents
15 that were provided to Mr. Hill and Mr. Phillips on November
16 26th by you?

17 A I don't think I'd say most because there were eight, but
18 certainly, the substantial documents showing the production
19 were the same documents from November 26th, and we just
20 supplemented and amplified. We gave them some deposition
21 testimony relating to it, but yes, the key documents, the
22 production log, the Bomar report as produced and as used by
23 Mrs. Rafizadeh at trial, were all things the Trustee had. In
24 addition, the Trustee also had the judgment and reasons for
25 judgment and the trial transcripts, and one exhibit was the

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1 discharge order. The only thing the Trustee may not have had
2 were Exhibits 4 and 5, which was deposition testimony excerpts
3 showing, again, Mrs. Rafizadeh's lawyers questioning Orix
4 employees about the Bomar report.

5 Q All right.

6 A And Exhibit 12, you asked me, is our memo in support.

7 Q Right. Ms. Eitel, did you provide Mr. Phillips with a
8 copy of the motion for summary judgment and the memorandum of
9 law?

10 A I did. I emailed it to Mr. Phillips that night after it
11 was filed and informed him that the Court was going to be
12 setting hearings the week of June 23rd, as we had been advised
13 by the clerk's office.

14 Q Is that email Orix Exhibit 13?

15 A Yes, that's exactly right. Orix Exhibit 13 is my email to
16 Mr. Phillips and copied to Mr. Hill and Mr. Wentworth,
17 attaching the motion with all the exhibits and the memo.

18 Q Now, as I understand it, there is a procedure in Louisiana
19 that's a little different than what we're accustomed to that,
20 and that being that certain pleadings or orders get actually
21 served by a sheriff, and there's some issues raised as to
22 whether or not -- actually, I think it's acknowledged that
23 Mr. Phillips didn't receive service through that process.
24 Could you take Judge Isgur through that, please?

25 A I can. In Louisiana, when you file a motion, you also

1 file what's called a rule to show cause, which is essentially a
2 notice of hearing. But the way it happens in state court
3 there, it's kind of old-fashioned. You file it, and the judge
4 or the clerk's office actually fills in and sets the date for
5 the hearing, provides it to the clerk, who provides it to the
6 sheriff. And you have to -- when you go file a motion like
7 that, you make request of the sheriff for service. In this
8 particular incidence, my office requested service, according to
9 the state court docket as it existed at that time, and because
10 the Trustee had intervened while the suit was in federal court,
11 the state court had no record of his intervention. And so when
12 the service of the actual rule to show cause, or i.e. the
13 notice of hearing, was made, that did not get served on
14 Mr. Phillips or anybody for the Trustee's team. They were only
15 -- I shouldn't say served, but they were only provided the
16 motion for summary judgment. Technically, email is not service
17 either. You can serve by fax. You can serve by hand. But in
18 this day and age, it's kind of routine matter to send things by
19 email, and Mr. Phillips got it and acknowledged getting it on
20 April 24th, the day it was filed. But he just did not get
21 served with the rule.

22 Q That was almost -- April 24th was what, approximately two
23 months before the hearing?

24 A Yes, the hearing was ultimately set for June 25. I
25 figured out on June 11th, when I was starting to get ready for

1 the hearings two weeks away, that Mr. Phillips had not been
2 served with the rule to show cause, and I discovered that error
3 and contacted him immediately as soon as I discovered that.

4 Q Did you have any discussions with him? I mean, did you
5 send him an email regarding that?

6 A I did. I started emailing him on June 11th and informed
7 him that I realized he had not been served with a rule to show
8 cause for the hearing on the 25th, even though he had the
9 motion for summary judgment, and that given the delay in
10 getting state court setting, this -- and since it had taken us
11 60 days to get a hearing date, I very much wanted to preserve
12 the June 25 trial date and asked if he would work with me on
13 trying to keep the hearing date of June 25, and in exchange, I
14 offered to give him whatever extension of time he needed to get
15 his brief on file. My benchmark for my discussion with him was
16 that, technically, under Louisiana rules, you can serve
17 somebody with a rule to show cause for a summary judgment
18 hearing 15 days in advance. Their opposition would be due
19 seven or eight days later. When -- so when I contacted him on
20 June 11th, if I had served him on June 10 -- I could have
21 served him legitimately on June 10th -- or the sheriff could --
22 with the rule, and he would have had to respond seven or eight
23 days later. So I said, "Look, now you know when the hearing
24 is. You know, will you just, you know, waive service of the
25 rule and then just file your opposition when you need to," and

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1 he ultimately agreed to do that and go forward. And in fact,
2 we agreed that he could file his opposition the day before the
3 hearing, and he did.

4 Q Okay. And during this time period, that being for the
5 date Orix filed its motion for summary judgment until the date
6 that the Trustee filed his opposition, were there any
7 discussions with the Trustee or Trustee's professionals
8 regarding the nullity suit and Orix?

9 A There were no discussions regarding the substantive
10 nullity suit. The only communications were the emails I just
11 discussed about scheduling and response dates. But again, no
12 discussion of the documents, the merits, the arguments, or
13 anything.

14 Q You know, Ms. Eitel, for purposes of clarification, let me
15 ask you to take a quick look at Exhibit 20. I believe you've
16 already testified about that. Can you please tell the Court
17 what that exhibit is?

18 A Exhibit 20, in the last page of it, you go through the
19 document, is my June 11th email when I realized Mr. Phillips
20 had not been served and said, "Accept my apologies, but the
21 hearing is set for the 25th at 10:00 a.m., and let's try to
22 keep that hearing date and work around it," and then there's an
23 email chain after it as we try to keep back in touch, trying to
24 keep -- again, trying to keep the June 25 hearing day. And he
25 told me he was going to talk to Rodney.

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1 Q Yeah. And then take a look at Exhibit 21, also.

2 A Exhibit 21 is another email chain related to that. I
3 think at one point, I was afraid I had not actually sent
4 Mr. Phillips the summary judgment, but I confirmed that I had,
5 and so I wrote him and said, "Oh, I found my transmittal from
6 April 24th. Can we still try to keep the hearing date on June
7 25 with you filing your brief, you know, with an extension of
8 time?" And so Mr. Phillips said, "Yes," you know, "I point out
9 that you didn't serve me with a rule to show cause, but I
10 will," you know, "we will go forward with the hearing on June
11 25 if I can file my brief late." So we did.

12 Q All right. Ms. Eitel, let me take you back to Trustee --
13 excuse me -- Orix Exhibit 14.

14 A Exhibit 14 is the Trustee's opposition to the motion for
15 summary judgment that I mentioned. He -- it was filed on June
16 24th.

17 **THE COURT:** I'm going to go ahead and break now.

18 **MR. RIOS:** Very well, your Honor.

19 **THE COURT:** I'll come back as soon as I can, probably
20 around 2:45 or so.

21 **(Recess taken from 2:26 p.m. to 2:48 p.m.)**

22 **THE COURT:** Be seated. So that you all know where we
23 are, there's a three o' clock unopposed small fee hearing, and
24 then there's not another hearing until four o' clock, so --

25 **MR. RIOS:** Thank you, your Honor. May I proceed?

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1 **THE COURT:** Yes, sir, please.2 **DIRECT EXAMINATION (RESUMED)**3 **BY MR. RIOS:**4 Q Ms. Eitel, I think we left off before the break -- I was
5 going to ask you to refer to Orix Exhibit 14.6 A Exhibit 14 is the Trustee's opposition to Orix's motion
7 for summary judgment that was filed in Louisiana State Court on
8 June 24th, 2008, the day before the summary judgment hearing
9 and that proceeding.10 Q Ms. Eitel, let me refer you to Page 4 of that motion,
11 under the subheading C, summary judgment, is it appropriate at
12 this stage. Do you see that?

13 A I'm sorry, yes.

14 Q What were the grounds that the Trustee was arguing for the
15 denial of summary judgment?16 A Well, the principal ground was that the Trustee -- or they
17 needed to do some -- they needed to -- discovery. "The parties
18 have not conducted adequate discovery and needed a fair
19 opportunity to carry out discovery and present their claim
20 before there was action on a motion for summary judgment."
21 Basically, more time to get more information or conduct
22 discovery.23 Q Okay. Did -- I'd also like you to read the sentence that
24 begins, "As stated by Mondona," after that string cite of
25 cases.

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1 A Yes. The Trustee said, quote, "As stated by Mondona, Orix
2 has not produced the Bomar report, despite repeated requests to
3 do so." This is the statement that Mr. Phillips and I
4 discussed earlier today, that we challenged as being absolutely
5 incorrect and that the Trustee did file a revised brief the
6 next day, modifying that statement because it was not true.

7 Q Now, I've asked you this question several times, that the
8 -- what Orix's reaction was. I think he had used various
9 adjectives like "stunned," "disbelief," things of that nature.
10 Needless to say, was their reaction consistent with your prior
11 testimony?

12 A It was. We were very concerned, once again, for several
13 reasons. Now, we are seven months beyond our disclosure and
14 providing to the Trustee. The documents of the Bomar report
15 had been produced. The Trustee's taking the position that
16 there's time needed, you know, needed to do some discovery, but
17 in the seven months since we provided the documents, we have
18 not been asked for additional documents, we have not been asked
19 substantive questions about what we had provided or produced.
20 And that just seemed to me to be keeping alive a very frivolous
21 and groundless lawsuit. The Trustee had no evidence that we
22 had seen -- certainly not disclosed to us, and it would be
23 impossible to have -- that we had filed to produce documents we
24 had.

25 Q Now, from the time that you saw -- first read the

1 Trustee's response to the motion for summary judgment and the
2 hearing, did you have any either written or verbal
3 communication with Mr. Phillips regarding the statement that
4 Orix did not produce -- had not produced the Bomar report?

5 A I did. I immediately sent Mr. Phillips an email later in
6 the day on the 24th and said, "I want to give you fair warning
7 that this statement is not true, and I," you know, "I expect
8 the Rafizadehs to sign -- to say these kinds of things, but I
9 am just very troubled when the Trustee makes these kinds of
10 representations. It's false. You know it's false, and I don't
11 know how you can say that consistent with Article 863."

12 Q And Article 863 is Louisiana's version of Rule 11?

13 A Yes.

14 Q All right. Let me refer you to Orix Exhibit 15.

15 A Exhibit 15 is my June 24 email to Louis Phillips and
16 Ashley Green. Ashley was the associate working with
17 Mr. Phillips on the file. And I told them that --

18 " -- fair warning, and I find it extremely troubling
19 the Trustee would be so cavalier in accusing Orix of
20 misconduct when he has no factual basis to do so.

21 The Trustee's opposition states Orix has not produced
22 the Bomar report, despite repeated requests to do so.

23 This is false. I expect this type of baseless
24 accusation from the Rafizadehs. I am shocked when it
25 comes from the Trustee."

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1 I then go in to explain some additional documents and
2 Bates Numbers and exhibits and how they correlate, and the
3 reason I did that is to show them all the different times the
4 Bomar report had been produced to both the Rafizadehs and the
5 Trustee, and I mentioned some more numbers that were not in our
6 original motion because between -- Mrs. Rafizadeh had filed her
7 opposition a week before the hearing, and in her opposition to
8 Orix's motion for summary judgment, she said, "Oh, we don't
9 want the Bomar report. That's not what we're talking about
10 that you attached as exhibits or summary judgment motion. We
11 want the Bomar report that Henry Bomar discussed and the MLMI
12 Trust litigation against UBS Warburg or La Funding (phonetic)
13 that was Exhibit 715 to that deposition. So to refute that, we
14 went and pulled out Exhibit 715 from the other litigation, the
15 MLMI Trust litigation, and showed -- guess what -- Exhibit 715
16 showed the Bates Number from the underlying foreclosure
17 litigation where it had been used and had yet another set of
18 Bates numbers on it from the MLMI Trust litigation. Same
19 document. It's a little bit like playing Whac-A-Mole. You
20 would provide the documents to Mrs. Rafizadeh, and they said,
21 "Oh, no. There's something else." We're like, "Well, no,
22 here. This is the same thing, and here's the proof it's the
23 same thing." And so that's why I explained that.

24 Q The summary judgment hearing, the Louisiana State Court
25 place, then took place the next day, correct?

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1 A Yes, on June 25.

2 Q What happened at that hearing?

3 A Well, there was some fancy footwork at first by Mrs. Rafizadeh and Super Future Equities to first intervene and then to get a continuance. We contested the continuance at the hearing, and the judge actually had a hearing on the motion to continue, and she denied Mrs. Rafizadeh's motion to continue and found that the summary judgment hearing should go forward. At the hearing, it was very clear, based on the judge's questions -- you know, we all -- you live dangerously when you try to read too much into it, but it was very clear that she'd quickly grasped and understood that the Bomar report had been produced and that there were all these other events of default that remained unchallenged by the nullity suit. So I would say the hearing went very well for the Orix team.

16 Q What positions did the Trustee take at the hearing?

17 A The Trustee opposed our motion for summary judgment throughout the hearing that day. Again, the position taken was consistent with the opposition, which is, "Oh, we need time to do discovery. We really should not have a motion for summary judgment at this stage of the proceeding, and please deny Orix's motion for summary judgment."

23 Q But in fairness, the Trustee did withdraw or correct the statement --

25 A Yes.

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1 Q -- that was made in the prior pleading?

2 A Ms. Green brought with her to court a corrected opposition
3 brief. It somehow didn't get -- make it into the state court
4 record, but she provided to the judge and provided to us that
5 corrected that statement that we challenged as being false that
6 particular day.

7 Q And subsequent to that hearing, did the Trustee then file
8 another -- an additional pleading?

9 A Yes. After the hearing on the 25th, Ms. Green, to her
10 credit, came over to counsel table and looked at the Bomar
11 report and looked at the exhibits and asked some follow-up
12 questions. I don't remember her specific questions, but we
13 talked for a very few brief minutes and showed her how the
14 Bomar report had been produced -- the same thing we'd been
15 telling the Trustee's team for seven months. I presume, based
16 on subsequent developments, the next day, they told us that the
17 Trustee would be withdrawing his motion for summary judgment --
18 his opposition, excuse me, to our motion for summary judgment.
19 And in fact, the Trustee did withdraw -- file a written
20 withdrawal of the summary judgment opposition on June 26th.

21 Q Is that Exhibit 16?

22 A That is, in fact, Exhibit 16. It -- the Trustee's
23 withdrawal of the opposition.

24 Q What was the basis for the withdrawal, as stated in
25 Exhibit 16?

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1 A Well, they said after listening to the arguments of the
2 parties at the hearing on June 25 and, quote, "as a result of
3 information obtained by the Trustee and Trustee's counsel for
4 the first time at the hearing, the Trustee no longer wishes to
5 have his opposition considered."

6 Q Okay. Do you have any idea what new evidence might have
7 been -- the Trustee might have been referring to in that
8 pleading?

9 A No. It's the same evidence. It's the Bomar report. Now,
10 there were different documents with Bates numbers provided in a
11 reply brief because Mrs. Rafizadeh had raised a new issue in
12 her opposition, but our exhibits to the motion for summary
13 judgment, the eight exhibits, were the documents with the Bates
14 label, they're the documents with the production log, and they
15 were the -- Mrs. Rafizadeh's Trial Exhibit 22. Could have been
16 additional evidence, but it's the same evidence. The Bomar
17 report was produced in 2002. So I took issue with that
18 statement.

19 Q Ms. Eitel, what was the result of the MSJ hearing?

20 A I think it was the next week -- excuse me. On July 1st,
21 the Louisiana court granted Orix's motion for summary judgment
22 and dismissed the nullity suit with prejudice, finding both
23 that the Bomar report had been produced as we had said all
24 along, based on the evidence, and making the legal finding that
25 because the other events of default were unchallenged by this

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1 default related to the property condition, it was not
2 inequitable or unconscionable to enforce the judgment. She
3 didn't challenge it, and so the judgment could just stand on
4 these other bases, even if Orix had done the terrible things we
5 have been accused of, which we have not.

6 Q Let me refer you to Exhibit 17, please.

7 A Exhibit 17 is the judgment and reasons entered by the
8 Louisiana court in the nullity action on July 1, 2008.

9 Q All right. Did -- were there any subsequent proceedings
10 that took place in the nullity suit after the summary judgment
11 was granted?

12 A There were. There were three post-judgment motions filed.
13 Mrs. Rafizadeh filed a motion for new trial, which was set for
14 hearing in August. Orix filed a motion for sanctions against
15 Mrs. Rafizadeh and her counsel, and Orix filed a motion for new
16 trial seeking prevailing party attorney fees from both the
17 Trustee and Mrs. Rafizadeh, and those three motions were all
18 set for the same day in August 2008.

19 Q And what was the outcome of those hearings?

20 A Mrs. Rafizadeh's motion for new trial was denied. Orix
21 was awarded some small amount of sanctions against Mrs.
22 Rafizadeh for having brought the nullity suit, and Orix's
23 motion for prevailing party attorney's fees was denied, based
24 on a finding that the original motion did not encompass a
25 request for attorney's fees.

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1 Q All right. Did anybody appeal those findings?

2 A No.

3 Q Ms. Rafi -- Ms. Eitel -- excuse me --

4 A Three strikes and you'll be out.

5 Q Three strikes and I'll be out, I agree. Were you involved
6 in the calculation process of Orix's objection to the Gordon
7 Arata fee application?

8 A I was. I reviewed the invoices provided by Gordon Arata
9 with its final fee application and identified as best as I
10 could which items related to the nullity suit and which items
11 related to the 9019 settlement and tried to isolate those out.
12 And I kind of did it both ways. I did a chart showing, "Here's
13 everything that we don't object to," and then I marked up
14 everything that we did object to, and that's how it got to the
15 calculation of about 50,000 in fees related to the nullity
16 suit, about 4,000 -- or 4,400 related to the 9019. Sometimes,
17 there were a lot of things together, and so it's not
18 mathematically precise, but it's as close as I could come based
19 on the information provided.

20 Q And since Orix filed its objection to the Gordon Arata fee
21 application, have those numbers changed or do we stand on the
22 amounts set forth in the objection?

23 A It's changed by about \$1,100. When I was preparing for
24 this hearing, I realized I had wrongly -- there were two
25 January 16th entries that related to the funding agreement, and

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1 we obviously did not object to amounts related to negotiating
2 the funding agreement, so I added those back in, and so our fee
3 objection, instead of being 55,000 and change is 54,000 and
4 change.

5 Q Let me ask you --

6 A So I made an error that was -- that I corrected in
7 Mr. Phillips's favor.

8 Q Understood. Let me ask you to refer to Orix Exhibit 18,
9 please.

10 A Exhibit 18 is the chart that I prepared that I just
11 mentioned, and we isolated out by date the entries to which we
12 did not object, showed who the timekeeper was by initial, how
13 much time was there, and we kind of categorized things by, did
14 it relate to the funding agreement, it's not objectionable; if
15 it related to just the general claim objection but not the
16 nullity suit, not objectionable. And so that's how we did it.

17 Q And those -- the entries that are highlighted on the first
18 page of that exhibit, are those the entries that were
19 originally objected to but that --

20 A Yes.

21 Q -- we've corrected?

22 A Yes. That was my error that I've gone back in and fixed,
23 and so on the second page, you get down and you'll see that
24 everything that's highlighted is different than the Exhibit 18
25 as filed in our objection on May 19th. And so the amount of

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1 Mr. Phillips's time that was objectionable went down by a few
2 hundred dollars and as did the total objectionable fees went
3 down by about a thousand. So our total objectionable fees on
4 our calculations is \$54,433.55. And also, the objectionable
5 expenses, I don't think that we had categorized those in the
6 prior Exhibit 18, and those break down to \$1,118.90. About
7 half of that's for the 9019, about half of that's for the
8 nullity suit.

9 Q And again, I think you've already answered this question.
10 I just want to make clear that the -- make sure that the record
11 is clear. Orix is not objecting to all time entries of Gordon
12 Arata related to the nullity action --

13 A That's correct.

14 Q -- correct?

15 A We did not object to the new trial motion that was -- the
16 fees for the new trial motion that were filed in November, the
17 fees for the motion to intervene, and any work that was done --
18 I guess I had assumed there was work that was done after
19 getting our November letter. I find out now that maybe I'm
20 wrong, but we did not object to those matters.

21 Q Let me refer you to Exhibit 23 quickly.

22 THE COURT: 22.

23 BY MR. RIOS:

24 A 22?

25 Q 22, excuse me.

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1 A Exhibit 22 is the Gordon Arata invoices that were attached
2 as an exhibit to the application for fees, and try to make easy
3 for everyone to review and to show how we made our
4 calculations, the things blocked in red are items we've
5 objected to that relate to the nullity suit. The matters
6 blocked in sort of a blue or a teal are things we objected to
7 related to the settlement. And as you can see, the great
8 majority of it is red, related to the nullity suit.

9 Q Ms. Eitel, why did Orix object to the fees related to --
10 the Gordon Arata fees related to the nullity suit?

11 **THE COURT:** Let me go ahead and interrupt you.
12 First, I don't know that I need to know why she did anything.
13 The question should focus on him. Second, I want to go ahead
14 and call my three o' clock hearing, so let me get you to reword
15 that when we resume. I don't think this will take very long.

16 **MR. RIOS:** Very well.

17 **(Proceeding was recessed from 3:04 p.m. to 3:08 p.m.)**

18 **THE COURT:** Mr. Rios.

19 **DIRECT EXAMINATION (RESUMED)**

20 **BY MR. RIOS:**

21 Q Ms. Eitel, let me refer you to Exhibit 19.

22 A Yes. Exhibit 19 is the March 2006 order granting the
23 motion to compromise between ORIX and the Trustee that related
24 to the sale proceeds of the real estate on which ORIX held a
25 first lien.

1 The settlement was approved and attached to the Order
2 as the unexecuted settlement agreement, and that's where this
3 6.9 million or so on sale proceeds were distributed,
4 5.9 million to ORIX, 1 million to the Trustee and where ORIX
5 also agreed to subordinate its claim to all unsecured creditors
6 in the case and to create an unsecured creditor reserve of
7 about, whatever it was, about \$150,000 so that every other
8 unsecured creditor got paid 100 cents on its claim regardless
9 of what ORIX was paid on the claim.

10 Q And this order also liquidated the secured portion of
11 ORIX's claim; is that correct?

12 A Yes. It liquidated and allowed the secured portion of the
13 ORIX claim in the case. And one of the reasons that ORIX
14 objected was based on this order on compromise with what Gordon
15 Arata has done because there couldn't be any benefit to the
16 estate when every unsecured creditor was going to be paid
17 before ORIX. The only winner, if there was going to be one, or
18 any benefit to the estate from the nullity suit would be the
19 Debtor, Madonna Rafizadeh, because everybody else was taken
20 care of but ORIX through the creation of the unsecured creditor
21 reserve and the subordination agreement.

22 Q Does the same reasoning go for the failed 9019 with
23 respect to the fees that Gordon Arata is seeking?

24 A Right. I mean, again, ORIX's position was there's just no
25 benefit to the estate when the settlement couldn't be approved.

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1 It was an expensive exercise, very much less so with respect to
2 Gordon Arata; and there was no benefit to the estate, and
3 that's why the objection was filed.

4 **MR. RIOS:** Pass the witness, your Honor.

5 **THE COURT:** Thank you.

6 Mr. Phillips.

7 **MR. PHILLIPS:** One moment, please.

8 **THE COURT:** Yes, sir.

9 **MR. PHILLIPS:** No cross.

10 **THE COURT:** Thank you.

11 Let me try and sort things out a little bit. The
12 Exhibit 22, I'm trying to reconcile Mr. Phillips' testimony
13 where he breaks out his fees into, I forget, but seven or eight
14 different categories of amounts. And those amounts are
15 different than your amounts.

16 Have you made any attempt to reconcile the amounts to
17 which he testifies to as to how the 50,000 is comprised versus
18 what you're testifying?

19 **THE WITNESS:** Your Honor, I heard those amounts
20 broken out today that way for the first time, and so I've not
21 had an opportunity to break it down and to do the comparison
22 that, obviously, needs to be done.

23 **THE COURT:** Okay. Are there any further witnesses?

24 **MR. LEE:** Your Honor --

25 **MR. RIOS:** Nothing from ORIX, your Honor.

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1 **THE COURT:** Okay. So ORIX rests.

2 Go ahead. You can step down.

3 **THE WITNESS:** Thank you.

4 **(Witness steps down)**

5 **MR. LEE:** May I put Mr. Phillips back on the stand
6 for a little rebuttal testimony?

7 **THE COURT:** Thank you.

8 **(Pause)**

9 **(Witness recalled / Previously sworn)**

10 **DIRECT EXAMINATION (REBUTTAL)**

11 **BY MR. LEE:**

12 Q Mr. Louis Phillips, could you tell the Court the summary
13 you gave in respect to the breakdown of the fees how that you
14 came to the conclusions you did when you testified to it on
15 direct examination?

16 **THE COURT:** And let me just -- I think that's also in
17 your reply, right?

18 **THE WITNESS:** Yes, your Honor.

19 **THE COURT:** Let me put that on the screen. I'm going
20 to follow it a little better and maybe everybody else can, too.

21 **THE WITNESS:** I did -- are you ready, your Honor?

22 **THE COURT:** No.

23 **THE WITNESS:** Okay.

24 **THE COURT:** Let me get it up there to where we can
25 all see it.

1 **(Pause)**

2 Well, now I don't know for sure if it was in your
3 reply today or if it was in your prior reply. Here it is.

4 **(Pause)**

5 Okay. Go ahead with your testimony.

6 **THE WITNESS:** All right. Your Honor, what I tried to
7 do --

8 **BY MR. LEE:**

9 Q Do you understand the question, sir?

10 A Yes, I think so. I'm not disputing the -- Ms. Eitel
11 advised me that she had found errors in my favor. I've not
12 really looked at that. What I tried to do, as opposed to
13 ORIX's approach to my time, which is to say that everything
14 other than what they could pull out regarding the funding
15 agreement and analysis of the judgment and the viability of the
16 judgment claim, is objectionable. They've come up with a
17 13,000 some-odd dollar number, which is non-objectable, and
18 it's roughly related to work that ORIX has pulled out that it
19 says relates to my work with the funding agreement and my work
20 analyzing the ORIX judgment claim under state law.

21 So everything else according to ORIX is either
22 nullity or Rule 9019. What I tried to do in my reply and in my
23 testimony today was to break out the categories of work that we
24 did within those two categories; in other words, the universe
25 is nullity and 9019 that's objectionable to ORIX. And what I

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1 tried to do was break the nullity universe into its subparts.
2 The 9019 itself contained -- and all I did was try to calculate
3 the 9019 time, add it up and come up with 13.2 hours of \$4,950.
4 I don't know if ORIX would agree or not, but that was my
5 approach to it.

6 With respect to the nullity action what I tried to do
7 was pull out the discrete components. Number one, completing
8 the federal court litigation, which was done in January. I
9 came up with twelve point -- with 23.1 hours. And I tried to
10 do an analysis of the people who did the work, come up with the
11 hourly rate times that. Then we came up with --

12 Q That's on Page 10 of your reply, correct?

13 A Yes, yes.

14 Q The 23.1 hours.

15 A 23.1 hours, \$4,585.50. And then what I did was I said
16 there was 12.3 hours from January to March, which amounted to
17 approximately \$4,012. And that, as I pointed out, related to
18 dealing with the way that the nullity action related to the
19 settlement agreement because. Mr. Tow had said stop working on
20 the claim in the nullity action because I've settled back in
21 January.

22 Then I went from March 19th to June 22nd, which was
23 the period of time in which we did our work in connection with
24 the nullity action but also in connection with the ORIX claim
25 analysis. And I think that any time an application, a time

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1 entry has said "nullity," it's been objectionable. And that's
2 fine, I understand that.

3 But we had 103 hours and I came up with \$24,803 for
4 the time spent in investigation and analysis, both of the
5 nullity action and overlapping analysis of the judgment claim,
6 because we thought that the judgment claim needed -- we had to
7 go through and see what could be objectionable, if anything, on
8 an appeal basis if the judgment was good.

9 Given the standard of review in Louisiana, which is
10 roughly the federal court standard, you don't get a fact review
11 but we were looking to see, first, was there any de novo. I
12 think general counsel, Mr. Hill, had offered some suggestion
13 that the default interest granted might be problematic. We
14 looked into the -- that was a fact finding that was because of
15 a trigger of a certain kind of default. So we felt like we had
16 to review, and did, use some search terms and did an extensive
17 analysis of the trial transcript that had happened back in
18 2004, I think, the exhibits, et cetera.

19 And what we tried to do was say, okay, we didn't
20 really do that much analysis in '07. That's established by our
21 second fee application. Our real analysis to the extent we did
22 it, and we did we think, came in 2008. And it came mostly
23 after March 19th when Mr. Tow said no -- well, the Court denied
24 the settlement March 11th and we got back on it around
25 March 19th and started doing our work.

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1 June 22nd I call that the day that we quit, I quote
2 "investigation." That's the day that we met with the
3 Rafizadehs and their lawyer at the request of Mr. Tow. I
4 believe that Mr. Tow had met with them in Houston and they
5 continued to tell him that we didn't understand the nullity
6 action, and they had volumes of information that they needed to
7 give us. And I'd like to deal with that in a minute if I
8 could, but we're talking about the break down of time.

9 The summary judgment I've gone -- I've dealt with and
10 I've come up with an amount of time that approximates \$7,100,
11 which is 36.35 hours dealing with summary judgment, including
12 the hearing. The hearing is in New Orleans, my office is in
13 Baton Rouge, so it was an all-day kind of trip down there and
14 getting back.

15 And then last, I've dealt with the prevailing party
16 motion and I brought that out at 35.65 hours, which is roughly
17 \$9,570. I think if you add those amounts and come up with the
18 \$4,950 related to the 9019, you reach, roughly, \$55,000.

19 What I was trying to do was to give the Court a break
20 down, given that ORIX says in its objection it didn't mind me
21 looking into the nullity claim, and that's why it didn't object
22 to the '07 time. Well, I didn't do any really looking into it
23 until '08, and I tried to break out the looking into it time as
24 well as the federal court litigation time because I felt like
25 we needed to finish the federal court litigation, which we did.

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1 And we did that some in 2008.

2 And those were the ways that I broke out what I
3 understood to be, roughly, \$55,000 of objectionable time to
4 give a component by component analysis for the Court in my
5 reply.

6 **THE COURT:** Anything further?

7 **MR. LEE:** Yes, your Honor.

8 **BY MR. LEE:**

9 Q Would you turn to the ORIX exhibits in front of you? Do
10 you have a set of those?

11 A Yes. I think so.

12 **(Voices heard off the record)**

13 Is that what this, (indicating), is?

14 **(Pause / Voices heard off the record)**

15 Q Why don't you turn to ORIX Exhibit Number 1?

16 A Yes.

17 Q After you received this letter of November 26th, 2007,
18 okay, why did you not call up Ms. Eitel and say, "I want more
19 documents, I want to do more discovery of you, I want to find
20 out more"? What were you doing?

21 A Well, when I got this I was right maybe one or two days
22 before filing pleadings in the federal district court that I
23 had to file within a Rule 59 timeframe.

24 Q Forget about that.

25 A All right. But you asked me what --

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1 Q Forget about that. I want to know what it is, why you
2 never made according to them one phone call to get more data
3 from Ms. Eitel or --

4 A I thought I had what they had.

5 Q -- ORIX or a bevy of lawyers from ORIX?

6 A I thought I had what they had.

7 Q Okay.

8 A They sent me what they sent. It was designed to convince
9 me that there was not a nullity action. It was. So I had from
10 ORIX what I had. My problem with the timeframe is that I had
11 that. Now I had to learn about the rest of it. Because I
12 didn't know anything about the litigation, I didn't know
13 anything about the discovery, I didn't know anything about the
14 funding litigation, I didn't know anything about the MLMI trust
15 versus UBS Warburg (phonetic) -- I didn't know any of that,
16 nothing. I had been involved in the precursor to the Texas --
17 to the adversary here, and I had no history with any of that.

18 Q Okay. So --

19 A Everything that we did in the Louisiana litigation
20 presumed a valid judgment, because there was a judgment there.
21 And so from my standpoint I had what ORIX had. But I've go to
22 tell you, this might as well have been Greek because I didn't
23 know anything about what it related to. Because we never
24 really analyzed the ORIX judgment in connection with the
25 litigation in Louisiana because it was the judgment, it was the

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1 judgment.

2 Q All right.

3 A So what I started trying to do in March, or in probably
4 January I started trying to do it because I thought we were
5 going to win at the District Court -- I didn't really know. I
6 sent out a request, not of ORIX for documents; I knew what its
7 position was. I sent out a request kind of through the wire to
8 the Rafizadeh side for documents and for their story. Because
9 I saw the nullity action but, frankly, I wanted to know their
10 whole story. And I didn't. And I also needed to learn what
11 the story was about the litigation, which I had to from the
12 starting place; I didn't know anything about it. I was called
13 off in January because of the settlement, so I didn't get back
14 to it until, in effect, the 19th, 20th of March.

15 Q Did you find the data gathering from the Rafizadeh side
16 very economical, efficient?

17 A No.

18 Q Okay. Tell the Court the process you went through to try
19 to get data from the Rafizadehs in connection with your
20 investigation.

21 A Well, I tried to get data from their Texas people, their
22 Texas counsel. They had Louisiana counsel. I got the feeling
23 that the Louisiana counsel weren't talking to the Texas
24 counsel, the Texas counsel were telling you guys what a great
25 case they had but as far as I could tell weren't communicating

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1 with Louisiana. Louisiana was telling me what a great case
2 they had but weren't sending me anything. And so what I tried
3 to do -- and at the same time -- and I kind of keep pointing
4 this out -- it meant something to me because I didn't
5 understand what was going on.

6 There was a joint prosecution directive that was
7 issued back in November of '07 that had not been followed
8 through with. In other words, there had not been a joint
9 prosecution order. There had been some motions filed seeking
10 an extension of the deadline. And through all of that I kind
11 of had the idea that I was supposed to be jointly prosecuting
12 something with the debtor side, and to do it I needed to know
13 what they had.

14 Q And tell us what you eventually got from the Rafizadehs,
15 if anything at all.

16 A I got stacks and boxes and boxes of paper and documents.
17 And I met with the lawyers at least twice. Ms. Eitel's
18 recitation of the filing of the motion for summary judgment is
19 correct. A couple of things she left off but I think are in
20 the email she pointed out, is I told her I was not going to be
21 around, I was not available, I was going to have to have
22 somebody stand in. And what I didn't tell her is I had to have
23 somebody stand in kind of for the whole week before, because I
24 was involved in something that was a very big thing that only I
25 could do.

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1 But we worked to try to get documents March to April,
2 April to May, May to June. And in June Mr. Tow contacted me
3 and said, "I want you to meet with the Rafizadehs." I got the
4 feeling they didn't want to send us anything because they
5 didn't trust Mr. Tow. But I finally sent them -- I did send
6 them in April, I sent them an analysis of the nullity action
7 that I had done on my own because I hadn't been able to get
8 anything from them. And it was basically that I thought they
9 were going to lose it.

10 Q When you say "they," who is "they"?

11 A The Rafizadehs were going to lose the nullity action.

12 Q Okay.

13 A I did not send that to ORIX. I sent ORIX the piece of
14 information, the memo that Ms. Eitel pointed out.

15 Q And why did you not resort to using official discovery
16 against them?

17 A They were my co-parties. And at some point I sent them my
18 evaluation of the nullity action based on my independent review
19 of everything, but I kept hearing they had all this stuff. And
20 even after I sent them my memo about that, they were very
21 inefficient in getting me the stuff. I met with them on
22 June 22nd and they brought a foot of documents, you know. I
23 did what I thought I was supposed to do.

24 Q Okay. Let's go back to the MSJ that was discussed in
25 direct examination of Ms. Eitel.

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1 A Yes.

2 Q Do you recall when you determined that there was an issue
3 regarding the exhibits attached to the ORIX MSJ in Louisiana
4 state court?5 A Well, I know that Ms. Eitel -- I listened to her
6 testimony, and she knows this stuff a lot better than I ever
7 will. She lived it, she breathed it, et cetera. When I met
8 with them on the 22nd they pointed out --

9 Q What is the "they"? Who is "they"?

10 A Okay. The Rafizadeh group.

11 Q Okay.

12 A And counsel. They pointed out that one of the -- that the
13 Bomar, '99 Bomar report, was initially referred to in
14 litigation that was not the Louisiana state litigation and it
15 was attached to a deposition and it had a deposition number.
16 And none of the things that they showed me had the deposition
17 number. My associate and I were in this meeting. We listened
18 to it. She had to review all the documents because our
19 response was due on the 24th.20 Up until then I didn't even think there was an issue.
21 When they showed me that there was a different number floating
22 around somewhere that I had not seen, I didn't know what the
23 exhibit looked like. When they showed me that, I thought,
24 well, let's see if we can run this to ground and what we had.
25 We couldn't and so we filed the response to the summary

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1 judgment.

2 And the reason that we filed the response -- and I'll
3 get to what we actually filed and how I tried to fix it in a
4 second -- is that I thought that at that point I had something
5 to go to ORIX with. But I filed a response. I was
6 Co-Plaintiff. I couldn't pull out of the litigation because
7 the prosecution order -- that was not objected to by ORIX --
8 had been entered on May 8th. I couldn't get a hearing before
9 the bankruptcy court before the summary judgment response was
10 filed. It had to be filed before the hearing.

11 And so if that was the only issue and the judge
12 didn't want to see it or ORIX presented something that showed
13 that the deposition exhibit was the same as the Bomar reports
14 that they had shown -- because they did show Bomar reports.
15 They had 2001 entries, they had 2000 entries. I didn't know if
16 it was the same report.

17 Q Okay.

18 A She's right, Ms. Eitel, that there were all kind of other
19 grounds upon which the judgment could be based. But in
20 Louisiana state court I've tried a lot of summary judgments
21 that I thought I would win, and they'd give me five seconds and
22 they'd say, "No, try it on the merits." Why? They're elected;
23 they don't have to rule on summary judgment. That's my
24 experience.

25 So what I thought at that time we could go back -- I

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1 told my associate to do a response. I looked at it. I don't
2 remember the sentence that was the offensive sentence. A
3 sentence that I fixed was incorrect. There had not been
4 repeated attempts to find information. It was just wrong. It
5 was a piece of a brief that was wrong and I didn't write it,
6 but it's my responsibility. And when it was brought to my
7 attention by Ms. Eitel, I fixed it.

8 Q Would you look at Exhibit Number 1 of ORIX's exhibit book
9 and tell me whether or not the issues that are set out there,
10 in your view, are simple or complex?

11 A Well, they were complex to me.

12 Q Okay. And have you ever known you or counsel for a
13 trustee to take at face value what is sent by the other side
14 and put (phonetic) the analysis?

15 A No. And I couldn't hear either.

16 Q All right. And was there anything extraordinary you had
17 to do in connection with the review of the allegations here
18 than what you have done in the pleadings set out in the final
19 fee application?

20 A Anything extraordinary? Uh.

21 Q What I'm asking you is did you do your standard analysis
22 that you would do for a legal problem that comes into your
23 door?

24 A Yeah, I guess. Except that I got called off of it. Then
25 we had to start over. And I had other things to do. I wasn't

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1 ORIXing ten hours a day. The other thing I had to do was
2 because I had no history I thought that I had to learn about
3 this myself. And it might have taken me longer certainly than
4 it would have taken Ms. Eitel to do this. But I have to say
5 that I didn't get a lot of help from the parties with whom I
6 was to jointly prosecute the action.

7 Q Not with the Rafizadehs.

8 A Yes.

9 Q All right. Finally, this notion of the plum, are you
10 aware of what I'm talking about when I say "the plum"?

11 A I heard a reference to the plum.

12 Q Okay. Did the trustee ever tell you or direct you to hold
13 off on your investigation so that he could use the claims
14 against ORIX as a plum to get a settlement from the Rafizadehs?

15 A He never told me to hold off of anything until I heard
16 from him in January to hold off because he had a settlement.
17 So, no, I never heard that from the trustee. The trustee never
18 directed me to hold off finishing up, no.

19 **MR. LEE:** Pass the witness, your Honor.

20 **THE WITNESS:** Because of the -- can you ask me a
21 question about my response to the summary judgment?

22 **MS. EITEL:** Your Honor, that's fine. I'm not going
23 to object. I know that I should but I want to be fair. Nobody
24 likes doing these objections.

25 **THE COURT:** What do you want to say?

1 **THE WITNESS:** Your Honor --

2 **MR. LEE:** Thank you, your Honor.

3 **THE WITNESS:** -- I would like for you to look at
4 Exhibit 33.

5 **THE COURT:** Yours or hers?

6 **THE WITNESS:** Mine. Page 4.

7 **(Pause)**

8 You'll see a red line.

9 **THE COURT:** Right.

10 **THE WITNESS:** I just wanted to point out to the Court
11 that when I got Ms. Eitel's email about the -- she said false,
12 I think, but it was certainly inaccurate -- statement on
13 Page 4, I went and found it and it was immediately clear to me
14 that it was wrong. And so I think I went up to the office at
15 1:00 or 2:00 o'clock in the morning, re-did it, sent this
16 redlined with my associate who was handling the hearing down
17 there so that she could give it to the Court and to counsel.
18 So I apologize for the statement. It's my fault. I'm the
19 partner. I just could not give it the attention that it needed
20 to have because we held the hearing date. We kept the 25th
21 hearing date even though I was in another court in an
22 unavoidable problem.

23 **THE COURT:** All right. Anything else?

24 **MR. LEE:** No, your Honor.

25 **THE COURT:** Anything else? Go ahead.

Phillips - Cross / By Ms. Eitel

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1 **MS. EITEL:** Two questions, your Honor.

2 **CROSS EXAMINATION**

3 **BY MS. EITEL:**

4 Q Mr. Phillips, I think I heard you say that you cannot take
5 ORIX's word for it or something like that with respect to the
6 November 26th, 2007 letter.

7 **THE COURT:** I think what he said --

8 **BY MS. EITEL:**

9 Q Is that a fair characterization?

10 **THE COURT:** What he said was --

11 **THE WITNESS:** I don't think that's a fair
12 characterization.

13 **THE COURT:** -- that he didn't -- I don't think he was
14 accusing you-all of --

15 **MS. EITEL:** I understand. He didn't want to --

16 **THE COURT:** -- he wouldn't take your word --

17 **BY MS. EITEL:**

18 Q You didn't want to rely.

19 **THE COURT:** What he said was he couldn't take what
20 one side said at face value.

21 **BY MS. EITEL:**

22 Q You didn't want to rely at face value what you were
23 presented in the November 26th, 2007 letter. Is that a fair
24 characterization?

25 A That's a fair characterization.

Phillips - Cross / By Ms. Eitel

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1 Q But after the summary judgment hearing on June 25,
2 Ms. Green reported back to you based on the evidence ORIX
3 presented that the Trustee should withdraw his motion to the --
4 his opposition to the summary judgment.

5 A Yes. But it's my understanding that Ms. Green -- and you
6 I think corrected it, you mentioned this today, that you sent
7 the thing with the exhibit sticker on it. It was the same
8 thing. That's all -- you can grill me all day, but that's the
9 thing that I found out about on the 22nd. It was the same
10 thing.

11 Q But until June 22nd the Exhibit Bomar 715 had not even
12 been an issue on your radar screen.

13 A That's right. That's right.

14 Q So until June 22nd you didn't think there was an issue
15 with --

16 A I didn't know about it.

17 Q -- respect to the nullity suit.

18 A I told -- I've testified here today that in April I sent
19 the Rafizadehs a memo based on what I had then that I didn't
20 think they were going to win the nullity suit. It was not
21 until the 22nd when I met with them that they mentioned
22 the 715. I must have missed it. I missed it.

23 Q And that's the first time they mentioned it to you,
24 correct?

25 A Yes.

Phillips - Cross / By Ms. Eitel

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1 Q And on my email to you of June 24th I explained Bomar
2 Exhibit 715 and showed, did I not, that it was the same
3 document previously provided?

4 A Yes. And I will tell you that I've heard your testimony
5 about what went on. My recollection of what I was told by my
6 associate was that once you presented what you presented, she
7 talked to you and she said -- and I thought it was during the
8 hearing. I thought she had advised the judge we were going to
9 withdraw. But she came back to me and said, "They produced it,
10 it's the one, they showed it to the court, we lose." I said,
11 "Then if we lose, we withdraw."

12 **MS. EITEL:** No further questions, your Honor.

13 **THE COURT:** Thank you. Anything else?

14 **MR. LEE:** No, your Honor.

15 **THE COURT:** Thank you. You can go ahead and step
16 down.

17 **THE WITNESS:** Thank you, your Honor.

18 **(Witness steps down)**

19 **THE COURT:** Both sides rest as to this particular fee
20 app?

21 **MR. LEE:** We do, your Honor.

22 **THE COURT:** Do I have the nullity action, the nullity
23 complaint before me in the exhibits?

24 **MS. EITEL:** I don't think we gave it to you, your
25 Honor.

1 **MR. UNIDENTIFIED:** I don't think so.

2 **THE COURT:** I need it. Can I get the parties --

3 **MS. EITEL:** I can get it for you.

4 **THE COURT:** First of all, is there any objection to
5 including it as part of the record?

6 **MR. LEE:** No.

7 **MS. EITEL:** No, your Honor. We can provide that and
8 we'll do so.

9 **THE COURT:** Let me get the nullity suit.

10 Let me tell you-all the general path I'm going to
11 follow, although I need to read the nullity suit to really
12 decide the substance of what I'm going to do. I mean as you-
13 all know, I am constrained by the *Pro-Snax* decision, which I
14 will be following, at 157 F.3d 414, Andrews & Kurth versus
15 Family Snacks, Inc.

16 We have a fee application here over which we have
17 jurisdiction under 28 U.S.C., Section 1334. It's a core matter
18 under 157. Here's the way that I read *Pro-Snax*. And I'm just
19 going to read you-all what I think are the relevant sections of
20 the case.

21 "Andrews & Kurth argues that a reasonableness test is
22 appropriate whether the services were objectively
23 beneficial toward the completion of the case at the
24 time they were performed. The petitioning creditors,
25 by contrast, advocate a more stringent test, whether

1 Andrews & Kurth's services resulted in an
2 identifiable, tangible and material benefit to the
3 bankruptcy estate. We determine today that the
4 stricter test is the appropriate measure."

5 A lot of people quit reading the case at that point.
6 But I think there's more to the case. In the last paragraph,
7 the Fifth Circuit goes on to say:

8 "The district court's instruction to the bankruptcy
9 court, to consider strongly the debtor's lack of
10 success in obtaining confirmation of the Chapter 11
11 plan, is consistent with the standards identified by
12 Congress in Section 330, which requires that at the
13 time the services are performed the chances of
14 success must outweigh the costs of pursuing the
15 action. Even though the bankruptcy court found
16 support for the Chapter 11 plan among creditors other
17 than the petitioning creditors, and if the plan had
18 been confirmed, the estate would have been brought to
19 a swifter conclusion than if the case were brought
20 under Chapter 7, we find that Andrews & Kurth should
21 have known from the outset that the debtor's
22 prosecution of a Chapter 11 plan would fail, given
23 that the petitioning creditors who collectively held
24 more than 50 percent of the indebtedness in this
25 case, filed an involuntary Chapter 7 case against the

1 debtor and repeatedly informed the debtor and the
2 bankruptcy court that they believed the case should
3 be administered under Chapter 7."

4 The way that I read their conclusions altogether
5 doesn't mean that we do an economic measure at the end of the
6 case. What it means is we have to figure out whether or not
7 there were identifiable, tangible and material benefits to the
8 bankruptcy estate, which may come about from resolution of
9 matters with which in a Chapter 7 case the Chapter 7 trustee is
10 charged.

11 To me that says that some of the things that the
12 Phillips Arata firm did were unquestionably compensable, and
13 the time that I've seen on it so far it looks reasonable to me.
14 For example, I think that defending against the prevailing
15 party motion not only was reasonable and necessary but also had
16 an economic benefit. If that hadn't been defended against,
17 then the prior conduct even if it was wrong, and it may have
18 been, saved the Trustee from having to bear ORIX's attorneys'
19 fees. That's compensable time. Analyzing the ORIX claim not
20 with respect to the nullity action is compensable time.

21 The 9019 -- and I'm making this finding very narrowly
22 as to the Gordon Arata firm -- was necessary because they were
23 called in as witnesses. And we had to figure out whether or
24 not to approve the 9019. That was not brought by the Gordon
25 Arata firm. It was brought by somebody else. They were

1 necessary witnesses. Their testimony was required to the
2 resolution of it.

3 And I'm keeping this narrow because I know that we're
4 going to have that fight on Mr. Lee's, and I don't know what
5 I'm going to do about that fight yet. But as to this one,
6 their testimony was necessary for us to decide not to approve
7 the compromise. And there was a benefit to the estate in not
8 approving it, in my mind.

9 Here's the hard question for me. I don't think
10 there's any question but that the Gordon Arata firm had to
11 evaluate the nullity action to figure out whether or not
12 pursuit of the nullity action was necessary to the estate.
13 Determining what claims are allowed against the estate is an
14 essential function of the Chapter 7 trustee, prosecuting
15 actions to disallow claims against the estate, a necessary part
16 of what a Chapter 7 trustee does. He has to do it win or lose.

17 A tangible benefit is finding out what the right
18 claims against the estate are. It isn't getting the
19 disallowance of a claim. It isn't the trustee's job to get
20 claims disallowed that ought to be allowed, but it is his job
21 to evaluate, with the assistance of legal counsel if necessary,
22 what claims ought to be allowed.

23 For example, the trustee might review a claim, need
24 legal counsel to assist him and never file an objection. That
25 is compensable time because it is, in fact, an identifiable,

1 tangible and material benefit to the bankruptcy estate to
2 figure out what the right claims are to be paid.

3 Here's why I want to read the lawsuit, and this is
4 where this is all going. I've got to figure out by putting
5 myself in Mr. Phillips' shoes just how complicated was it once
6 he got the November 26th, 2007 email. And I have to do that in
7 the context of what was the nullity suit. That's why I want to
8 read it.

9 I know looking back today what happened and I know
10 looking back today that the Rafizadeh sponsored nullity action
11 was frivolous. But I don't think I'm supposed to look back
12 today to see that the Rafizadehs filed something frivolous
13 against ORIX and then say: Okay, well since that was filed
14 frivolously, any work the trustee did on it is non-compensable;
15 because I do think there is an identifiable, tangible and
16 material benefit to the estate to figuring that question out.
17 And in this case it was very helpful to figure it out. If that
18 nullity suit had kept going forever and never gotten resolved,
19 we would have never ever gotten to the end of this case and
20 there would have never been funds that were distributable.

21 The issue now is sort of crystallized, you know. Was
22 the Bomar document produced by ORIX? Absolutely, it was. And
23 the November letter shows that it was. But what I don't know
24 is whether reading the November letter in the context of what
25 was alleged in the Complaint was enough such that Mr. Phillips

1 should have read it and said immediately, "I'm not going to
2 pursue getting rid of the federal judgment," for example.

3 I've got to say that I'm not really persuaded by the
4 whole federal judgment testimony that Mr. Phillips gave;
5 because if the federal court made an error but, nevertheless,
6 the error was harmless because the nullity suit was frivolous,
7 why are we spending estate money to do it? The initial money
8 had to be spent, and I think everybody agrees the initial money
9 had to be spent because there needed to be enough time to get
10 Mr. Phillips' feet on the ground to review it. And this isn't
11 his only case.

12 But I don't know whether reviewing that material
13 along with the lawsuit is a one-hour task or is a 150-hour
14 task. And I can't tell that without sitting down and reading
15 all of that.

16 What I am going to do is figure out when I think he
17 should have figured it out. And if I think he should have
18 figured it out in November, then I'm not going to allow the
19 time after November, not that pertained to the nullity suit.

20 If I think he should have figured it out -- to make
21 up a date because I don't know this answer yet; I'm going to go
22 read the time entries carefully in the context of reading the
23 nullity suit -- January 15th, that's going to be the cut-off
24 date. And things that are pure nullity after that date I'm not
25 going to compensate him for.

1 What I really haven't figured out yet is if I think
2 it should have taken him eight hours to figure it out -- and
3 again that's hypothetical because I haven't read the lawsuit --
4 but he spent that eight hours in June, I'm probably still going
5 to compensate that because he needs to read it long enough to
6 figure it out. But if he put everything in the wrong order and
7 a reasonable person would not have, then it's not compensable.
8 I just need to see how difficult it was.

9 If figuring out what the nullity suit was about was
10 so difficult that it was reasonable to wait and he needed to
11 pursue the federal court action in order to preserve his
12 ability to review it, I'm going to compensate for the federal
13 court action.

14 So without reading that and putting it into context I
15 can't decide. That's why I want it, that's how I'm going to
16 divide up the time and that's going to be the decision. And I
17 have not yet gone through, and I will, as unpleasant as it will
18 be, you know, the red boxes entry by entry in order to figure
19 out which portion of each entry is properly classified as
20 nullity and which portion of each entry is properly classified
21 as reviewing the claim, for example, for unallowed interest and
22 things of that nature, all of which is compensable.

23 So it's going to take me more time to figure it out.
24 I don't know how long it will take. That's what I'm going to
25 look at. That's, basically, going to be the basis of the

1 decision. And I'll, obviously, supplement these oral findings.
2 But I wanted everybody to know what I was going to do, how I
3 was going to go about it.

4 Is there anything else I need to do on that?

5 **MR. LEE:** Thank you, your Honor. Nothing else.

6 **THE COURT:** Let's talk about then the other two fee
7 applications. How long do you think it's realistically going
8 to take you to present the case on that?

9 **MR. LEE:** I think with respect to the Diamond
10 McCarthy fee application on direct it should be about
11 45 minutes to an hour. And then with respect to Mr. Tow's fee
12 application I think it's driven off by --

13 **THE COURT:** Yeah, his is --

14 **MR. LEE:** -- a percentage calculation.

15 **THE COURT:** Yeah.

16 **MR. LEE:** And I don't think ORIX has objected to it
17 other than to say that the calculation needs to be corrected.

18 **THE COURT:** And how long do you think it's going to
19 take for you-all to present your anti-Kyung Lee --

20 **(Laughter)**

21 **MR. RIOS:** Your Honor, Mr. May has been so busy the
22 last couple of weeks I haven't really had the opportunity to
23 discuss the presentation with him. My gut tells me it's
24 probably about an hour.

25 **THE COURT:** Does he need to be here for the direct

1 case and the cross examination?

2 **MR. RIOS:** Your Honor, I would like him to be. But I
3 know that everybody's schedules are crazy right now. So to the
4 extent that we're trying to get this in sooner rather than
5 later, I'm fine with him not being here.

6 **THE COURT:** Well, I've got that question. The other
7 sort of sub-question to that is whether we're going to take a
8 while. And these may take a while. The same thing is true on
9 the Gordon Arata one, whether we ought to approve the unopposed
10 ones and then leave the opposed ones while I try and figure it
11 all out and write opinions so that people aren't waiting on
12 money.

13 **MR. RIOS:** It's certainly okay with me, your Honor.
14 However, I'm not certain that you can approve the trustee's
15 motion because it's keyed off distributions that are to be made
16 to the professionals whose fees we've objected to. Although I
17 guess there is a certain --

18 **THE COURT:** He could just take some sort of a
19 pro-ration of whatever he actually pays out, because he only
20 gets it on what he pays out.

21 **MR. HILL:** That's easy enough, Judge, to apply the
22 percentage --

23 **THE COURT:** I mean I think these may take a while to
24 get decisions out on. Because if it's going to be anything
25 like this hearing where I've got to go through every day's

1 entries and figure out what I want to do with them, I mean if
2 I've got to through \$400,000 worth of entries one by one, you
3 know I don't know what year I'll finish. And I'm serious.
4 It's just going to take a long time.

5 **MR. RIOS:** I understand.

6 **THE COURT:** I don't want to hold up anybody while I
7 try and reach conclusions about all that stuff. Now, I don't
8 know that I'll have to go through line by line, but I'm
9 guessing I will.

10 **MR. LEE:** Your Honor, as a method to this process I
11 would propose that we submit another interim order allowing the
12 unopposed amounts and we'll take the numbers off ORIX's
13 objection, the larger number. And then I don't know what --

14 **THE COURT:** The larger number?

15 **MR. LEE:** Well, in other words, the biggest number
16 that they've objected to, which is --

17 **THE COURT:** You'll disallow the biggest number.

18 **MR. LEE:** Correct.

19 **THE COURT:** Yeah.

20 **MR. LEE:** For interim basis.

21 **MR. RIOS:** That's works.

22 **MR. LEE:** And then the only problem is -- and then I
23 think Mr. Tow can make the calculation off that. The only
24 problem that I have is with Mr. Phillips. They've objected
25 to -- his fee seeks 68,000 and they've objected to 55. And so

1 I guess --

2 **THE COURT:** Well, I've just told you what I'm going
3 to do though --

4 **MR. LEE:** Right.

5 **THE COURT:** -- on the prevailing party motion. I've
6 told you what I'm going to do on the 9019. And so at least a
7 little of that will get added back in based on these
8 preliminary announcements unless there's going to be some
9 attempt to --

10 Can we just get a stipulation that if there's an
11 appeal there will be disgorgement in the event that I'm
12 reversed on any of this? Mr. Phillips, is that --

13 **MR. PHILLIPS:** Sure.

14 **THE COURT:** Does that work for you-all?

15 **MR. RIOS:** Yes, your Honor.

16 **THE COURT:** Just put that in the order.

17 **MR. LEE:** May I propose this, then? That
18 Mr. Phillips go back in and add back in the amounts that you
19 were discussing and --

20 **THE COURT:** Get Ms. Eitel to sign off.

21 **MR. LEE:** And get with Ms. Eitel --

22 **THE COURT:** It's still going to be though -- I don't
23 know the number, but there's going to be a \$40,000 or so amount
24 that remains in contest --

25 **MR. LEE:** Correct.

1 **THE COURT:** -- while I try to reach a decision. And
2 that can't be paid until I reach a decision about it. And on
3 you-all's --

4 **MR. LEE:** That's fine.

5 **THE COURT:** -- it's going to be 300 and something
6 thousand. It will be 300 and something thousand on the Diamond
7 McCarthy application.

8 **MR. LEE:** No, your Honor. It will be 420 thousand.

9 **THE COURT:** That would be fine.

10 **MR. LEE:** Yes, your Honor. It's the larger amount.

11 **THE COURT:** Okay.

12 **MR. LEE:** And I have no problems with that, your
13 Honor. Thank you.

14 **THE COURT:** Well, let's just try and do it then on --
15 we'll try and do it all when you've got your client here.

16 **MR. RIOS:** June 4th.

17 **THE COURT:** Whatever date that was we said.

18 **MR. HILL:** Your Honor, the section on commission is
19 330(a)(7). They stuck in there as 326.

20 **THE COURT:** And does it --

21 **MR. HILL:** 330(a)(7). It just simply says that it
22 will be treated as a -- it shall be treated as a commission
23 computed under 326, and 326 says that's a maximum amount.
24 That's where the argument comes in.

25 **THE COURT:** So they didn't solve the problem.

1 **MR. HILL:** They didn't say it's a flat commission and
2 that's it. They just said it was to be treated as a
3 commission, whatever that means.

4 **THE COURT:** I'm showing it on my calendar on June
5 the 4th.

6 **MR. LEE:** What time, your Honor?

7 **THE COURT:** Well, I'd said before 3:30. And I've
8 reserved two hours for this hearing. I mean you-all know that
9 a lot of times when we reserve two hours people settle and so
10 there's more time. So if you-all want I'll schedule you
11 earlier and just make you wait 'til 3:30 or else I'll schedule
12 you for 3:30. I know you-all don't want to come back multiple
13 times, but it's up to you-all.

14 **MR. LEE:** My preference would be to be scheduled
15 earlier and take the risk and be here ready for you, your
16 Honor.

17 **MR. RIOS:** Same. I'd rather get it -- start earlier
18 than later.

19 **THE COURT:** Do you-all want to schedule yourselves
20 for 1:30 and it'll basically be a docket call at 1:30 and I'll
21 tell you whether to come back at 2:30 or 3:30 based on the
22 announcement?

23 **MR. LEE:** That will be terrific.

24 **THE COURT:** Because they may just settled and --

25 **MR. RIOS:** That sounds fine.

1 **MR. LEE:** June 4th, your Honor.

2 **THE COURT:** Let me just see who the -- Osyka is
3 Mr. Stroube?

4 **MR. RIOS:** Yes, your Honor.

5 **THE COURT:** And let me see who is representing
6 Mr. Huff (phonetic). I think that's Mr. Kirkendall but I'm not
7 sure.

8 **(Pause / Voices heard off the record)**

9 **MR. LEE:** Thank you, your Honor. 1:30 works for this
10 side of the table.

11 **THE COURT:** Hold on. Let me just tell you who we've
12 got. So you-all can probably make some phone calls and figure
13 out what you're doing. Yeah, it's *Kirkendall versus Stroube*.
14 So they ought to be able to give you some better forecasts.

15 But we'll set it at 1:30 but you-all are going to
16 wait. And that will basically be a docket call.

17 Anything else we need to get done?

18 **MR. RIOS:** One last thing, your Honor. The nullity
19 suit, can we just deliver a copy to chambers under cover
20 letter, a copy to Mr. --

21 **THE COURT:** I'd rather have it as part of the --

22 **MS. EITEL:** I can upload it as Exhibit 23.

23 **THE COURT:** -- appellate record. Just upload it
24 and --

25 **MR. RIOS:** Okay.

1 **THE COURT:** -- we'll admit it. Yeah, that way
2 there's no question on an appeal what it is. And I think that
3 given how various courts have interpreted, you know, *Pro-Snax*,
4 this could easily get appealed and I want to be sure that we
5 have a full and complete appellate record.

6 **MR. RIOS:** Very well.

7 **THE COURT:** Let's get it on up there. If you'll just
8 file it. Ms. Eitel, if you'll file within the next week and
9 then --

10 **MS. EITEL:** I'll get it filed today, your Honor.

11 **THE COURT:** You'll have a week after she files it to
12 file something that tells me it's not the right lawsuit or
13 something but --

14 **MR. LEE:** Your Honor --

15 **THE COURT:** Well, I mean you know if she makes a
16 mistake.

17 **MR. LEE:** I do want you to know it is my intent one
18 day to bring you a case where we don't have the issue go up on
19 appeal (laughs).

20 **THE COURT:** You know, it's okay.

21 **MS. EITEL:** Always a problem --

22 **MR. LEE:** Thank you, your Honor.

23 **THE COURT:** Thank you.

24 (**This proceeding was adjourned at 3:58 p.m.**)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



May 29, 2009

signed

Dated

TONI HUDSON, TRANSCRIBER